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# EXCLUSIVE TERRITORIAL ALLOCATION LEGISLATION

## **HEARINGS**

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

# COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SECOND CONGRESS SECOND SESSION

ON

S. 3040, S. 3116, S. 3133, S. 3145 and S. 3587

BILLS TO PROVIDE THAT UNDER CERTAIN CIRCUMSTANCES
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## PART 1

PURSUANT TO S. RES 256, SECTION 4

AUGUST 8, 9, AND 10 AND SEPTEMBER 12 AND 14, 1972

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## EXCLUSIVE TERRITORIAL ALLOCATION LEGISLATION

### TUESDAY, AUGUST 8, 1972

U.S. Senate,
Subcommittee on Antitrust and Monopoly,
Committee on the Judiciary,
Washington, D.C.

The Subcommittee on Antitrust and Monopoly convened in room 2228, New Senate Office Building, at 10:30 a.m., Hon. Philip  $\Lambda$ . Hart presiding.

Present: Senator Philip A. Hart.

Staff present: Charles E. Bangert, general counsel; Peter M. Chumbris, chief minority counsel; Charles E. Kern II, minority counsel; Patricia Bario, editorial director; and Janice Williams, clerk.

Senator Hart. The committee will be in order.

I suggest we proceed, although I understand Senator Moss of Utah plans to be here. He has some schedule problems. When he arrives, I would suggest we interrupt and have his testimony.

I have a brief opening statement.

The fact that there are 36 sponsors of the bills before us would

suggest there is substantial interest in this legislation.

Four of the bills would grant antitrust exemptions to soft drink bottlers so that they may be assigned to exclusive territories. Within these territories, no competition would be permitted for the distributor's same brand.

The fifth bill will make it lawful for distributors of any type of

food to have similar protection.

While the number of the cosponsors is impressive, the bills are controversial, both as to procedure and content. Procedurally, Congress is considering this kind of legislation when the Trade Commission's challenge to the exclusive territories granted distributor-franchisees of soft drink syrup manufacturers is in the process of movement. That Trade Commission case has not been decided. But these bills are asking Congress to overturn an action before it has been taken.

In the case history of antitrust, there is some reason for the soft drink distributors to be apprehensive of the outcome of the Trade Commission's challenge. Recent cases—Schwinn, Sealy, and Topco—all went to the Supreme Court and generally are interpreted as making exclusive territorial arrangements highly vulnerable to attack by the antitrust enforcement agencies.

These bills would have the Congress replace the courts in judging the issues as they affect soft drink bottlers, and would make it, at best, extremely difficult for the antitrust agencies to question agreements which result in large metropolitan areas being served by one supplier of Coke. Similarly, this would apply to other soft drink franchisees.

These bills are offered as a vehicle to save small business. There are many small businesses in this industry serving many local markets. These businesses were billed as exclusive agencies to market particular

soft drink products within fixed territories.

Most of the territories for the leading brands of soft drinks were divided more than a half century ago. Since that time, many territories have been combined, and companies serving such combined territories are often large.

Nevertheless, many territories remain small, and the businesses in them remain small. It is concern for this latter group that brings us

together today.

Proponents urge that the bill is needed to protect small bottlers from the competitive pressures of large bottlers and, in some cases, parent franchisers. The argument goes that if exclusive territories were eliminated as a legal element in franchise agreements, price competition for large accounts will become greater, making it more difficult for marginal bottlers to survive, and resulting in higher prices in small retail outlets which are costly to serve.

The Trade Commission says that overall the consumer will be bet-

ter served at a lower average price.

Proponents of this bill deny this; but assert further that even if it were so, the cost in terms of business loss is more than we should be willing to pay.

Generally, I am not happy presiding over hearings which are seeking exemptions from the antitrust laws. Yet the issues here certainly

deserve consideration. Clearly, they are not easily resolved.

It would appear, if we choose to aid small business in this industry, we may also aid giants. Soft drinks are a nickel and dime or dimes and quarters, but they add up currently to annual totals exceeding \$5 billion.

The largest franchiser, Coca-Cola, has annual sales of about \$1 billion domestically, and about \$1.8 billion total, and is currently the largest single domestic retailer and bottler of Coca-Cola products.

Many of the distribution operations that would be granted territorial protection, and thus assurance of no intrabrand competition by this bill, involve operations of more than \$100 million in sales annually. Many of the owners who would benefit from this proposed antitrust exemption rank among the largest companies in the Nation.

I must confess a certain sense of wariness regarding the ultimate effects flowing from the passage of such legislation. Will the bill really protect small business, or will it ultimately serve to entrench big business and concentration! How much, if anything, will this legislation

cost the consumer?

I would hope that the hearings which begin today will provide us with information sufficient to make judgments which will serve the public interest.

I am delighted we can welcome and open the hearing with our first

witness, the Senator from Utah, Ted Moss.

Senator Moss' concern for small business, I believe, is known to all of us, and his chairmanship of the Subcommittee on Consumer Affairs

has given, I think, him an opportunity to bring to an analysis of the legislation before us which will be helpful.

We're glad to hear from you.

## STATEMENT OF HON. FRANK E. MOSS, SENATOR FROM THE STATE OF UTAH

Senator Moss. Thank you, Mr. Chairman.

I appreciate the opportunity and I do appreciate your courtesy. I know the pressures under which you are operating in holding this hearing, because of the floor situation. I, like you, have other

obligations.

You were speaking of the conflicting interests that are involved here between an antitrust situation or a monopoly situation as against protecting the small business entrepreneur and the consumer. It reminded me of the fact that I have just come from a hearing where the oil producers are talking about the reasons for the decline in oil exploration, they say the decline is caused by the restraint on price of the product and environmental problems at the predator hearings also now going on the wool growers are saying that if they cannot control the predators, they will be out of business. The conservationists, on the other hand are saying that we are destroying a species with predator control.

So every problem is one of great conflict. I recognize the problem

that is presented to you, as chairman of this subcommittee.

I will try to be rather brief. I will stay with my text, and perhaps

that will be briefer than if I tried to summarize.

Senator Hart. Senator, let me make a statement now which, if I make it after you finish, will be regarded as proof to those who believe we within the establishment apply one set of rules for ourselves and

another set for those not in the club.

The rule applies across the board as follows: As many of you know, the majority leader requested committee chairman to hold their hearing days to a minimum because of "must" legislation pending on the floor. We have received special permission to hold these hearings because of the extreme interest of numerous colleagues in this legislation.

However, since there is pending business on the floor, I would like to make a special plea to all witnesses to limit their testimony to 15 minutes. Of course, prepared statements will be incorporated in the record as though given. I believe that the letters of invitation to witnesses have contained the request that their oral testimony be limited

to 15 minutes.

I will ask Mr. Bangert to keep track of the time, and signal our

witness when the 15 minutes has expired.

Senator Moss. Thank you, Mr. Chairman. I will try to stay within the limitation. I understand it fully, because I am constrained, as are

you, by the same request of the majority leader.

I want to appear today in support of S. 3133 and other identical bills. It is particularly urgent that an appropriate remedy be found so that hundreds of small businesses involved in the bottling of soft drinks not be swallowed up by competition of a few dozen metropolitan bottling plants.

For more than 70 years the soft drink industry has been operated under a franchise system which has served us well. In 1971, the FTC issued complaints against a number of soft drink franchise firms which sell syrup to local soft drink bottlers.

The FTC alleged the companies have hindered competition in the soft drink industry by restricting the manufacturers to designated

geographic areas.

Even if the territorial restrictions in this industry were per se a violation of antitrust laws—and the tenor of this legislation does indicate that these territorial restrictions are likely a violation of antitrust laws—the removal of the territorial restrictions would be disasterous for the franchisees of this industry, and certainly would be of questionable value to the public interest.

Soft drink manufacturers are small businessmen. They represent a strong local economic force in 1,600 communities. This industry makes a meaningful contribution to our economy. It employs more than 150,000 wage earners, and the investment in plant and equip-

ment exceed a billion dollars.

The results of the termination of the traditional territorial system would likely include the elimination of a large majority of independent small bottlers, who presently are important contributors to the local economies.

Such action would result in the loss of millions of dollars in investment. A substantial concentration of soft drink manufacturing would move into the hands of large, regional, metropolitan companies from

the hands of small business.

Take my State of Utah, for example. Soft drink sales produced by bottlers estimated at a total of \$19 million for 1970. There are 23 firms in Utah operating 25 plants, employing 652 persons with a payroll of \$3.5 million. Most of these bottlers are small, employing about 20 persons each; some nine employ between 20 and 50.

The plants are located in 13 cities throughout the State. These bottlers, of course, purchase goods and services in these smaller com-

munities.

Looking at just one brand of soft drink and its plant in Utah, we can see what would happen if the territorial restrictions were com-

pletely removed.

Coca-Cola has nine bottling plants in Utah. They range from a small plant in the southwest corner of the State, Cedar City, to a large plant in Salt Lake City. If the territorial restrictions were removed, the Salt Lake City plant could easily, due to the efficiency of mass production and large operation, move in and take over the customers of the local bottler in the Cedar City region. And 20 or so people in the small town of Cedar City now employed there would be thrown out of jobs and their earnings would be eliminated.

An equally important consideration also comes to light. In our part of the country most people use returnable bottles. People just can't see using nonreturnable bottles and cans. After all, when you use a nonreturnable bottle or can, you end up buying a can or a bottle with a

little soda thrown in.

If the big Salt Lake City bottler were to take over distribution in Cedar City, there would be only nonreturnable bottles and cans. You see, it's just one of those facts of life. You cannot ship returnable

bottles 250 miles from Salt Lake City to Cedar City, and then economically bring the returnables back. With distances like this there would not be several deliveries a week to the retailers. There would be weekly or bi-monthly routes, and it would be impossible for the retailer to stock up the many returnables, in addition to being too costly for the bottler to carry back that many returnables 250 miles.

As an example, we used to have three beer breweries in Salt Lake City, and one could buy beer in returnable bottles. Today there are no beer breweries in Salt Lake City, and you cannot buy beer in return-

able bottles.

Throughout the country this pattern, which has taken place in the beer industry, has indicated to me that local plants are the only way of protecting the environment from the glut of throwaway bottles and cans that currently plague us.

If you will recall. Mr. Chairman, back in March we shared the job of chairing hearings in our Subcommittee on the Environment, at which legislation was discussed which would require the use of return-

able bottles.

If we had only bottlers in large metropolitan areas servicing the entire State, we might as well forget about trying to protect the

environment from bottles and cans which litter the roadside.

You might wish to have your subcommittee staff review those hearings, which contain ample testimony of the necessity for maintaining the strong position of the local bottler if we are to prevent throwaway bottle pollution.

I have those hearings in my hands.

If environmental impact statements were required for Federal Trade Commission complaints, I do not believe we would have assigned a passing grade to this particular case.

For in addition to the letter of the antitrust laws and their effect on the public interest, we must weigh the impact of the enforcement of

those laws upon our citizens and our environment.

In my considered judgment, the total elimination of territorial restrictions would render the small businessman a victim of the too strict interpretation of the antitrust laws, and would result in an even greater burden on our environment through the necessity of use of throwaway bottles in a highly concentrated soft drink bottling system.

Mr. Chairman, I would be pleased to answer any questions you

may have.

Senator Hart. Thank you very much. Needless to say, I was listening to your account about the environmental aspects, an element which

has never occurred to me and should have.

As you described it, I would have concern about the fellow in Cedar City. But legislation that we are presenting would permit exclusive territories for any bottler, whether he is small as is the man in Cedar City or, as in the case of New York, where the Coca-Cola bottler in New York City controls all the outlets in the city and Puerto Rico, the populations of which run up to 25 and 30 million.

Do you think we should consider responding to the problem as you describe it, to the problems of the demand in Cedar City, but not include in whatever relief is given him the type I described in

New York City?

Senator Moss. I pondered that problem and wondered if there were not reasonable distinctions which could be made on size. But I did not come up with a solution simply because I could not justify a different kind of treatment simply on the basis of size.

Now, about the problem you raised in which one territory includes a great metropolitan area—New York obviously seems to be the type of concentration that the antitrust laws are aimed to break up.

But when we do that in this particular instance, it shoots all the little ones down. One of the problems we have—and it is nationwide, it is not just confined to Utah—is the decline of our small towns and cities in our more rural areas, and people flowing into the metropolitan areas.

So whenever I see anything that accelerates that trend, I want to stop it and see if there is not some way to turn it back. And this legislation fitted economically that objective with the additional factor

that I brought up about the environmental protection.

Senator HART. Well, some. I understand, have suggested that you could protect the smaller business enterprise, safeguard the environment, encourage competition, and preserve the integrity of the antitrust laws by freeing the majority of soft drink bottlers from territorial restrictions, and yet maintaining the territorial restrictions on the large, metropolitan bottlers.

If I understand that suggestion, you would have the small bottlers competing with other small bottlers; but the large urban bottlers

will not be allowed to deal outside their urban territories.

Now might it not be helpful to fuss around with that kind of

supervision?

Senator Moss. Yes. I think that is well worth exploring. It may be that there is a breaking point some place in there by economic measure or number of employees, where the territorial restriction could no longer be enforced. Or we could by law provide it could no longer be enforced, because then the bottler would pass over the line by reason of size and concentration of population, where the element of exclusivity then became a burden on commerce.

Senator Harr. There is a clear suggestion that the economics of the industry makes it inevitable that there will be production consolidations into large plant operations, whether in Cedar City or Salt Lake City or Hancock or Marquette, Michigan. I reached for that: I have

no idea whether there is a bottler in either place.

Even if this legislation were to be enacted, I would anticipate that by changing the contractual relationships between the franchisor and the franchisee, there would be such a consolidation and removal from Hancock to Marquette. Is that right?

Acquisitions and mergers, Salt Lake City with Cedar City. That kind of activity would not be forestalled, as I understand it, by adop-

tion of the bills that are before us.

Senator Moss. Well, the way I read it is if the prohibition against exclusive territorial jurisdiction at which the bill is aimed goes into effect, then the little fellow in Cedar City is not going to be able to stay in business if the big Salt Lake City bottler can come into his territory, with the same product—we were using Coca-Cola as an illustration—because then immediately he is in a price squeeze.

He is already pretty well regulated by price. People in the soft drink industry are under pressure of price, and the distributor does not

sell his product if he goes up too much.

But he has to depend on having a territory in which to distribute his product. Part of it is that he can take the bottles back, because they are readily obtainable in that area. And this enables him to stay in business in Cedar City.

But if his territory may be invaded by another Coca-Cola bottler and that bottler begins to flood the product in there, then he prob-

ably cannot survive.

Senator Hart. You state very well the concern expressed to me, and which is reflected in these bills.

Are there any questions?

Mr. Chumbris. I do not have a question, Mr. Chairman. I just want

to interject a thought that Senator Moss has brought out.

I was just wondering—from your suggestion we would face the problem of discrimination if we just try to apply the exclusivity to a group of franchisees in one area, and then not to include the other.

We have had that problem with certain bills. When we wanted to pass a law, where we only apply it to three or four businesses within

an industry, and leave out the others.

That is one question I think we should get some expert testimony on. I am just wondering where the danger would be, if we try to bar the big franchisee, because the question would be: Well, the little fellow coming in would go to New York City from a small town, and try to invade this territory. Would he have the financial strength to do so?

I interject that only as a question which we may discuss as we go

through these hearings. Thank you.

Senator Moss. That is a very difficult question to answer.

As I indicated. I am troubled with that in trying to find a breaking point. I said if this can be worked out that would be all right with me.

Mr. Chumbris. Thank you.

Senator Hart. Senator, thank you very much.

Senator Moss. Thank you. I appreciate the opportunity.

Senator Hart. This is the first time the committee has had an opportunity to welcome the new Assistant Attorney General in charge of

Antitrust, Thomas E. Kauper.

Many of us, who have a relationship with Michigan, are proud the country has an opportunity to see the quality of the law school faculty from the University of Michigan as reflected by the professor there, who is a son of a professor.

STATEMENT OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY KEITH I. CLEARWATERS, SPECIAL ASSISTANT TO THE ASSISTANT ATTORNEY GENERAL

Mr. KAUPER. Thank you, Mr. Chairman. I will endeavor to stay

within the prescribed time limit.

I appreciate this opportunity to appear before you today to present the views of the Department of Justice concerning S. 3040, S. 3116. S. 3133, S. 3145, and S. 3587. All of these bills would amend the Federal Trade Commission Act to provide that nothing in that Act or any of the anti-trust laws shall make certain exclusive territorial arrangements involving food products unlawful. These bills, if enacted, provide antitrust immunity for restricted vertical territorial arrangements.

In considering any congressional grant of immunity, we start with the premise that it is fundamental national policy to promote and protect competition as the basic regulator of goods and services in our economy. This policy has long been embodied in the antitrust laws enacted by Congress.

The Congress, of course, may grant exemptions from such laws, either because it believes that the conduct in question is not anticompetitive or because on balance, the detrimental effect on competition

is overborne by other policy considerations.

But those who would seek exemptions from the operations of these

laws bear a heavy burden to show the need for such treatment.

This, then, is the central issue in these hearings. Do the proponents of such legislation show special, and clearly convincing, circumstances which would justify congressional immunity from the operation of the antitrust laws?

Until that question is strongly answered in the affirmative on the record before this committee, the Department must, as a matter of antitrust policy, object to this legislation. It is up to the Congress, of course, to determine whether other considerations justify enactment.

The focus of these bills, I understand, centers upon complaints brought by the Federal Trade Commission which challenged territorial restrictions imposed by eight of the Nation's largest soft drink syrup manufacturers. These restrictions confine franchisees of the manufacturers to designated territories and prohibit one's franchisees from competing for the customers of another franchisee selling the same brand.

The FTC has challenged these activities under section 5 of the Federal Trade Commission Act as an "unfair method of competition,"

and the cases are presently pending in the Commission.

Under the Department's liaison procedures with the FTC, the Commission has for the most part taken the leading enforcement role in the soft drink industry. Because of that primary role, I defer to the Federal Trade Commission witness, who is scheduled to testify before this committee at a later time, as to any specific details concerning that industry, such as practices, markets, and the like.

I believe my testimony today would be more helpful in setting out some of the general legal principles concerning territorial restrictions. I will also discuss the general competitive factors involved in this legislation, which we believe should be considered by this committee

from the perspective of antitrust policy.

The bills before this committee are all quite similar in language. They would amend section 5(a) of the Federal Trade Commission Act by adding a new paragraph (7). This proposed amendment would be applicable to certain provisions included in trademark licensing agreements pursuant to which the licensee engaged in the manufacture, distribution, and sale of a trademarked food product.

The proposed subsection would render lawful under the antitrust laws and the Federal Trade Commission Act provisions in any such agreements granting a licensee the exclusive right to manufacture, distribute, and sell the trademarked food product in a defined geographical area, or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such products only for ultimate resale to consumers within a defined geographical area.

The subsection would apply only if: (1) The product is in "free and open competition" with products of the same general class manufactured, distributed, and sold by others: (2) the licensee is in "free and open competition" with vendors of other products of the same general class: and (3) the licenser "retains control over the nature and quality of such products in accordance with the provisions of the

Trademark Act of 1946, as amended."

The bills would thus basically be limited, because of the manufacturing requirement, to bottling franchisers. The one exception to this is S. 3587, which would extend to franchisees engaging in "the manufacture, or distribution or both, and sale of the trademark food product." That bill would appear to extend to virtually every food franchising operation.

All bills would permit the owner of a trademark covering food products to incorporate in its licensing agreement, provisions restricting the franchisee to selling the product only within a geographical

area assigned it by the licenser.

It is clear that these bills would substantially change the existing law relating to competition in franchising. Under the decisions of the Supreme Court in *Schwinn* and *Topco*, it is a per se violation of section 1 of the Sherman Act for a manufacturer-franchiser to impose territorial restrictions on franchised dealers, once the manufacturer-franchiser has parted with the title to the goods.

In short, a manufacturer under existing law may not limit the areas or customers for which his distributors may compete. Such restrictions on intrabrand competition have been viewed by the Court

as clearly anticompetitive.

In understanding the Supreme Court's decision that territorial restrictions of the type used by *Schwinn* are per se illegal, it may be helpful to understand the technical meaning of the per se rule.

Conduct has been made the subject of a per se prohibition when in the vast majority of cases the conduct is anticompetitive, and there is no strong economic reason for permitting the conduct. The per se rule provides certainty to the business community, and facilitates administration of the antitrust laws.

In short, a per se rule does not deny that there may be an occasional, highly unusual case where the conduct is not, in fact, anticompetitive. Such conduct may nonetheless be condemned because of the need for a simple, clear rule, which reflects the impact of the conduct in an

extremely high percentage of cases.

An alternative approach is a rule of presumptive illegality, which places upon the defendant the burden of establishing that the conduct in question has no anticompetitive effects in the particular case, and that there are sound economic reasons for the practice. The Government argued for such a rule in *Schwinn*.

The bills before the subcommittee, however, are designed to exempt so-called vertical restrictions in certain industries from the antitrust laws altogether. This not only eliminates the per se rule, but any rule

of presumptive illegality as well.

These hearings are in large measure the substitute for judicial or administrative hearings. Any judgment to confer such an antitrust exemption, whether a judgment by a court, an agency, or the Congress, should be based either on findings that vertical territorial restrictions in the industries covered by the bill have no significant anticompetitive effects and are necessary to provide increased efficiency in distribution of the trademarked product, or upon other overriding policy considerations.

As I understand it, the primary economic justification advanced for the use of these restrictions so far as soft drink bottlers are concerned is the fear that bottlers in one area will raid the best accounts in the

primary areas served by another presumably smaller bottler.

The latter, unable to market his product in distant areas and losing his best accounts locally, will not be able without such customers to service the smaller, less profitable accounts, in his own local area.

As a result, sales to these customers are not made at all; and the manufacturer, consumers, and small retailers are the ultimate losers. Hence, it is in the manufacturer's interest, and ultimately in the interest of the consumer, to confine each distributor or bottler to a specific territory which he will develop intensively because he has nowhere else to make sales.

The argument is, then, that intrabrand competition should be eliminated so that the manufacturer can reach more accounts and consumers

will better be served.

In addition, the argument is made that a major portion of the Nation's bottlers are small businesses, who are subject to intense pressures from large chain supermarkets and who cannot withstand the additional pressures of the other bottlers marketing the same brand. By assuring the bottler that a specific territory is his, the franchiser will remove the latter pressure, and enable the small bottler to continue to compete.

The fear expressed by the proponents of the legislation is the exit of small bottlers from the market, or, alternatively, the consolidation

of small bottlers into larger entities.

The well-being of small bottlers and the efficient distribution of the trademarked product are, of course, legitimate and important concerns. In assessing the impact of the proposed legislation in the context of a particular industry, however, a number of countervailing antitrust concerns must also be taken into account in order to determine whether, on balance, the net effect of these vertical restraints is beneficial or harmful to the consumer and the economy as a whole.

The comments which follow are addressed solely to the impact which such vertical restraints may have on competition, the basic goal of the antitrust policy, and are the basis for the Department's concern with

the legislation.

Antitrust objections to the type of restraints covered by these bills rest on the belief that restraints on intrabrand competition are economically undesirable, and that the consumer should be given a choice, not only among brands, but between dealers selling the same brands.

Such choice maximization is an essential goal of antitrust. Moreover, vertical territorial restrictions may tend to increase concentration, or insulate already concentrated markets from what market pressures may remain.

Several of these generalized objections may be particularly relevant

to the soft drink industry.

The restrictive arrangements which would be legalized by this bill are the type which would result in the elimination of all forms of competition between suppliers of a particular trademarked prod-

uct; that is, intrabrand competition.

The provision that such arrangements would be permissible only if the product "competes" with other similar products and the licensee "competes" with vendors of other similar products, represents the belief that interbrand competition will be adequate to insure to all buyers and consumers the benefits of competition. Reliance on interbrand competition alone, however, may not adequately promote and protect the public interest in competition.

First, many products which might otherwise be classified as of the "same general class" may be highly differentiated in the public's mind, due to extensive advertising and marketing promotions. Where heavy promotional activities succeed in creating strong consumer preferences for a particular manufacturer's product—that is, the brand is differentiated—the price of that product may be raised above a competitive level, without substantial losses of sales to similar products.

Food products are generally widely advertised with a view toward

creating particularly strong consumer brand preferences.

These marketing strategies may confer upon suppliers of a product some margin of power to maintain noncompetitive, higher prices; visa-vis, other brands of similar products. Thus the existence of strong brand preferences in the soft drink industry, if such be the case, may enable a bottler with a local monopoly to extract higher prices for his brand than if several bottlers of the same brand competed.

Second, there is a relatively high degree of concentration in the manufacturing of a number of food products. In concentrated industries which emphasize brand differentiation promotion, the elimination of intrabrand competition is particularly undesirable.

In such industries, territorial restrictions on distribution tends to extend the oligopolistic characteristics present at the manufacturing level down the chain of distribution. In local territories in the bottling industry, for example, this could translate into a highly concentrated four or five distributor local market.

To the extent that the bigger bottler may handle more than one trademarked brand, the local market could become all the more con-

centrated. Price rigidity may well be the result.

As I have previously noted, the argument may be made that market coverage can be enhanced by vertical territorial restrictions, thereby increasing sales of the product. But these restrictions may involve a cost to society in terms of price uniformity in concentrated markets, increased nonprice competition which further raises entry barriers, and higher dealer markups and costs of distribution arising from insulated market positions.

It is not likely, therefore, that vertical restrictions would result in a better allocation of resources. Under our competitive economic sys-

tem, the market has proven to be the most desirable mechanism for the

allocation of the Nation's resources.

If a substantial number of customers desires greater market coverage, the expansion of demand for the services of distribution facilities, and corresponding increase in the demand for products which are distributed widely, will give firms with relatively limited market coverage an incentive to increase the number of their distribution outlets.

Finally, let me note that the laws protecting competition have long provided a flexible tool for dealing with business arrangements which

involve some restriction of competition.

In enforcing the antitrust laws the courts have attempted to recognize the legitimate business interests and needs of the parties and to permit the implementation of private arrangements to the extent that they do not unreasonably and unnecessarily restrain competition.

In the majority of cases, it would be difficult to demonstrate that the use of closed territorial sales restrictions is necessary to achieve whatever purposes might be claimed for them, or that such purposes would clearly outweigh the public interest in the preservation of competition.

In examining the proposed bills, we suggest that these concerns.

relating to antitrust policy, be carefully considered.

Senator Hart. Thank you very much.

In very understandable language, I think you have laid out for us the basic guidelines that Antitrust seeks to establish, and the reasons that, as a society, we believe are valuable to that cause.

It is an extremely precise statement. You echo the counsel that was given us in earlier days when one of your predecessors, Prof. Donald

Turner, testified on exclusive territorial franchise legislation.

As I understand it—and I am grabbing some language from your testimony here—you would examine, very closely, antitrust exemptions such as these bills, and would approve them only on the affirmative finding that vertical territorial restrictions, covered by the bills, have no significant anticompetitive effects and are necessary to provide increased deficiency in distribution of the trademark products, or upon other overriding policy considerations.

Mr. KAUPER. I think that is a fair statement. It is, in effect, the

statement I gave, as a matter of fact.

Senator HART. I buy it.

Considering some of the fears that you expressed, with respect to the soft drink industry in particular, is it fair for me to assume that you would think Congress would not be acting with great wisdom if it enacted any of these bills?

Mr. KAUPER. Senator, based on what I have seen to date and I don't know what facts will actually appear in this record—but certainly, the position I have stated to the committee, at this point, would indicate that I do not believe it would be wise for Congress to do that.

Senator HART. You take up the argument advanced in support of the bill—that competition between bottle brand "A" and bottle brand "B" would protect us—even with exclusive territories.

Your statement does point out that this particular commodity is in a market where high advertising expenditures should develop some

strong consumer preferences.

In a sense, you are warning us that Coke is cola, but there may not be any substitute in the minds of many consumers. This means that many of those concerned would be willing to pay the premium prices to get that favorite product—even though it was a product whose price reflected the absence of any other source.

Have I stated our position correctly?

Mr. Katper. Yes. I think that is, obviously, one of our concerns, as to whether or not in a differentiated product market, there is the kind of competition which would bring the most competitive price the problem being the advertising expenditures which do create a consumer preference.

Yes, I do think that is a fair statement.

Senator Hart. In the last point I would like to raise with you, you remind us that, in a sense, Congress, in making a decision on these bills, is playing the role of the court or of the administrative agency.

You are saying that these bills eliminate, not only the per se rule,

but any rule of presumptive illegality, as well.

Would I be correct in saying, the bills would change the per se illegal

practice to per se legal practice?

Mr. KAUPER. I would say, if one accepts that to be the case that you do have a per se rule of illegality, at the present time—it would be in essence to go to a rule of per se legality, were these bills enacted.

I think one does have to recognize there is the provision in the bill which talks about free and open competition with others, but with that

caveat, rather clearly it's a rule of per se legality; yes.

Senator HART. Would it not follow—while you would not urge it—but if the Congress decides to make a change we should not tie the hands of the Government completely by making it per se legal but, go not further than substituting the rule of reason.

Mr. KAUPER. I would think that, from my point of view, would be

preferable, if there is to be a move in that direction.

Senator Harr. Mr. Bangert? Mr. Bangert. I have no questions. Senator Harr. Mr. Chumbris?

Mr. Chumbris. I just have a few, Mr. Chairman. Professor, on page 1—you stated:

In considering any Congressional grant of immunity, we start with the premise that it is fundamental national policy to promote and protect competition as the basic regulator of goods and services in our economy.

That is an objective that Congress intended when it passed the antitrust laws.

Again, Congress in its good judgment, in at least 10 major instances, has granted exemptions from the antitrust law, labor unions being the most significant.

They said unless the workers, in those days, could unite into a union and be exempt from the antitrust laws, they could not compete with

the problems that face them.

We have cited exemptions in the Newspaper Preservation Act, and in the Football Merger Act, the Bank Merger Act, the Small Business Act, all of which gave specific exemption to the antitrust laws, and right down the line.

Some exemptions are greater than the others.

So, in answer to the chairman's question whether Congress would be wise in granting an exemption in this bill, we would have to take that in the light of was Congress wise in getting those exemptions since the first one back in 1914 was given to the labor union exemptions.

Mr. KAUPER. I do not want to be misunderstood as suggesting all

grants of exemptions are improper, or anything of that sort.

Obviously, Congress has granted exemptions. It has the power to grant exemptions, and in days in the future it may well grant more

exemptions.

What I am trying to indicate, however, is it seems to me one does not grant an exemption lightly. The particular record before this committee is what is going to be of critical importance. Our concern is with basic antitrust considerations, those concerns which are reflected, obviously, to a degree in the present antitrust laws.

Mr. Chumbris. I am not taking issue with you, you understand? You are doing the job you are supposed to be doing, upholding the antitrust policy of this country. I'll point out, 36 Senators who put their name on the bill, are well aware this is going to be an exemption.

They are well aware of the point you raised on page 2, that the record will have to show whether this exemption should be granted, and, in order to do so, they would have to be well aware weighing the scale, whether we are considering national antitrust policy more important than a lot of businessmen being driven out of business, because of a change of interpretation in the law affecting the franchising system. The previous interpretation permitted them to act since 1890.

Some of these bottlers have been in business since 1890, and, sud-

denly along comes the Schwinn case and says it is bad.

That is why this bill was introduced. As a matter of fact, bills were introduced prior to the *Schwinn* case, as the chairman stated, when

Donald Turner came to testify during 1966.

I think the *Schwinn* case was decided about 3 or 4 months after we held the hearing, because, if I remember correctly, we had held the hearings, and the American Bar Association had a convention and the *Schwinn* case broke, and a good round robin of discussion as to the impact of the *Schwinn* case was held at the convention.

That is all I have.

Senator Hart. Professor, thank you very much. Mr. Kauper. Thank you, Senator. My pleasure.

Senator HART. So our remaining witnesses may be able to anticipate the schedule, we will hear, in the following order, Mr. Crawford Rainwater, Mr. Pope Foster and Mr. John Strachan.

Mr. Rainwater, president of the National Soft Drink Association.

Mr. Chumbris. May I make a brief statement, at this point?

Senator Gurney wanted to be here to introduce Mr. Rainwater, but they are having an executive session at Government Operations, this morning, and he just cannot break away from the executive session to do so.

May I suggest, Mr. Chairman, that Senator Gurney's statement be submitted for the record, which will precede Mr. Rainwater's statement.

Senator Hart. It will be printed. I am sure you understand the problem Senator Gurney has.

Mr. RAINWATER. I certainly do.

#### SENATOR GURNEY'S INTRODUCTION OF MR. CRAWFORD RAINWATER

Mr. Chairman, I am pleased to have the opportunity to introduce to this subcommittee a distinguished Floridian, Mr. Crawford Rainwater, Mr. Rainwater is a soft drink bottler, president and director of Hygeia Coca-Cola Bottling Company of Pensacola, Florida, whose company not only makes an important contribution to the economy of my home state, but also to that of the neighboring states of Alabama, Georgia, South Carolina and Texas.

He is president of the National Soft Drink Association, following in the footsteps of his father, Charles V. Rainwater who was a founder and the second president of that organization. Mr. Rainwater has actively participated in the bottling industry since graduating from Emory University of Atlanta, Georgia.

One reason I take such pleasure in introducing Mr. Rainwater stems from his outstanding participation in community affairs in Florida. Mr. Rainwater has served on the National Executive Board, Boy Scouts of America, Inc., and was chairman of the Gulf Coast Council and the Capitol Fund Campaign, for the building of a boy scout trail reservation and a scout service center. He is a trustee of the University of West Florida Foundation, and a past president of the Pensacola Junior College Foundation. His activities extend to 4-H club projects, for which he has received several awards for his services to youth. He takes active interest in other organizations as well, such as the Greater Pensacola United Fund, the Pensacola Baptist Hospital, and the Rotary and Kiwanis Clubs.

This record speaks for itself. It amply justifies my pride as a Floridian in this distinguished fellow citizen, and it gives me confidence that this subcommittee will give due regard to his knowledgeable counsel.

Mr. RAINWATER. Mr. Chairman, my name is Crawford Rainwater. I am president of the National Soft Drink Association, which represents 1.340 soft drink manufacturers in the United States.

Mr. Chairman, in the interest of time, as you have requested, I will summarize my statement, but request that the complete statement be made a part of the record.

Senator HART. The complete statement will be. (See p. 32.)

## STATEMENT OF CRAWFORD RAINWATER, PRESIDENT, NATIONAL SOFT DRINK ASSOCIATION

Mr. Rainwater. Testimony by the association will be offered in three major components. My statement, and that of Mr. John Strachan, who is the soft drink bottler from the State of New York, will present the industry in terms of operational practices, competitive and marketing features, and specific industry conditions.

The legal aspects of this proposed legislation, in terms of antitrust law and enforcement policy, will be covered by Mr. Earl Kintner, former general counsel to the chairman of the Federal Trade Comis-

sion, who is special counsel for the association.

The third facet of our presentation will be that of Dr. Lee E. Preston, an outstanding authority on the economic relationships of marketing organization and public policy.

With me is Mr. Charles Ruttenberg, who is also special legal counsel to the association, and Mr. Dwight Reed, assistant executive vice presi-

dent of the association.

I believe, Mr. Chairman, that an understanding of the competitive

arena of the soft drink is essential to an appreciation of how this almost

unique industry structure took place.

The product has never been associated with any particular mode of consumption, or place of consumption. Since soft drinks can be enjoyed everywhere, we have believed for three generations that the most successful manufacturer will be the one who places them everywhere, readily available to every consumer.

Since there was no distribution system that provided such wide market coverage, and since it was felt that the low price could not support an additional profit level, the manufacturer remained his own distributor, dedicated to capturing every conceivable retail establish-

ment as an outlet for his product.

Now, if I may, let us go to page 10.

The backbone of this industry resides in small towns. Of the 2,878 manufacturing facilities in the country in 1971, 1,765, or 61.3 percent.

were located in cities with populations of 50,000 or less.

There are several different types of owners in this business. After considering companies owned by diversified corporations, those owned by franchise companies, and these owned by multiplant companies, both large and small, there remain about 2,000 small, local manufacturing firms serving the United States.

These are the companies jeopardized by the FTC action.

To present a precise profile of the industry, in terms of number of companies, number of plants, location and such, we have attached, as an appendix to this statement, a tabulation of soft drink plants, by State and by number of employees.

Of 3,027 plants in 1970, 76.2 percent, or 2,287, employ less than 50

workers.

Almost every major franchise licensed to produce a trademark brand in this industry, has contained a territorial limitation since the practice of franchising began in the early 1900's.

Bottlers, in the overwhelming majority, do not—do not, let me emphasize—do not view territories as burdensome limitations on their

competitive freedom.

Not only is territorial exclusivity the only way we know to encourage and develop the depth of market penetration, which is exemplified by this industry, but it is the only way by which small, independent businessmen would undertake the extensive risks and responsi-

bilities of soft drink bottling.

The marketing method traditionally used by the soft drink industry has been delivery and service through route selling. This method of selling has produced intensive competition between bottlers of different brands for the trade of virtually every restaurant, food store, filling station, beauty salon, bowling alley, and thousands of other outlets within each market, as well as competition for shelf space within the supermarkets.

Low prices and unexcelled service to the public at all retail outlets

have been the results of this intensive competitive activity.

Here in the Washington, D.C. market, for instance, consumers have available to them in supermarkets and convenience stores alone, 38 brands of soft drink products. These brands offer a multitude of product choices, including 24 different cola flavored products in competition.

Depending upon the size, the brand, and the package of the unit purchased, there is a total of 17 price alternatives for the same equivalent amount of product—72 ounces.

Additionally, there are literally thousands of other retail outlets offering many of these brands at an unestimated number of retail

prices.

This degree of interbrand competition is not unusual for a metropolitan market of this size.

Now, please turn to page 18.

We would like to turn now, Mr. Chairman, to our most carefully considered estimates of what would take place in the industry if it were restructured as envisioned by the staff of the Federal Trade Commission.

The results which soft drink bottlers see, as following from the

destruction of the territorial system, include the following:

First, the elimination of the majority of small, independent bottlers throughout the Nation; second, a rapid concentration of soft drink production into large, regional plants; third, an increase of soft drink concentration at the retail level, including vertical integration into soft drink production; fourth, no lasting reduction in soft drink price to consumers; and fifth, the creation of pressures for increased prices of soft drinks to consumers.

Now, I would like to discuss each of these points just briefly.

First, we are certain of the elimination of the large majority of independent, small bottlers who are presently active competitors in the industry and who are important economic contributors to their local communities.

The Cresap study, working four typical soft drink markets in the United States, confirms that between 75 and 92 percent of the bottlers studied, depending upon customer and variable cost profiles, would not be able to operate profitably, should the FTC complaint succeed.

If the territorial system is destroyed as a result of the government's action, warehouse delivery to grocery chains, co-ops, and other large volume buyers, will become the rule as the Commission staff correctly surmises.

The largest bottlers will secure this business because of their economies of scale in production and their physical proximity to the food

warehouses.

A single bottler for each major brand will, in most instances, capture all or nearly all of the retail chain grocery business within any one food distribution area.

The great majority of remaining bottlers in such a market will be

left with only low volume, high service cost accounts.

Faced with the necessity to raise prices to what, at best, are marginal accounts, and suffering the penalties of decreased production efficiencies, these bottlers will simply die.

With them, of course, will go the employment, payrolls, tax contribution, purchasing power, banking, and other commercial contributions

they make to their local communities.

We believe, Mr. Chairman, that the loss of these local businesses can be measured in equally important, if more subjective, terms. The local manufacturer has long been traditional to the fabric of American society. The local bottler is very much a participant in that social and economic mural.

We know, also, that the demise of the hundreds of bottlers will result in the loss of millions of dollars of invested capital. These investments were made in reliance upon the legality of the bottler's exclusive trademark rights.

A very large part of the bottler's net worth consists of his exclusive rights. And with these rights stripped away by government action,

the value of his business is lost in great measure.

Two, in the event that the territories are lost, there will follow a very rapid concentration of the bulk of the soft drink business into a

few, powerful regional and national soft drink producers.

We also see opportunities for forward integration into soft drink production by the major syrup manufacturers. With the bottler incentive to fully develop his market gone, the franchisers may have little incentive to remain wedded to the franchise practice. Thus, forward integration into bottling and canning by the large syrup and flavor manufacturers may take place.

Third, we believe, Mr. Chairman, that loss of the territories will bring an alarming increase to the economic power of the major grocery chains to control the soft drink market, thus channeling particular

benefit to their store-controlled and store-owned labels.

It is quite realistic, also, in view of practices in other product fields, to expect backward integration into national-brand soft-drink produc-

tion by the chains.

Once territories are removed, the chain need only acquire the very smallest of franchisees in order to become an authorized producer of the national brand. It could then produce for its own account and sell to other accounts in order to take advantage of economies of scale.

Fourth, we do not believe there can be any lasting reduction in prices of soft drinks to the consumer. One of the theories used to justify removal of territorial arrangements in this industry is based in the belief that, with conversion from local route selling to regional foodstore warehouse delivery, the wholesale price of soft drinks will plunge to the assigned store-delivered cost of private labeled drinks.

Now, we contest this theory on three counts.

The floor price of the national brand could never equal the floor price of the store brand, because of the promotion and advertising expenditures which support national brand sales—indeed, all soft drink sales—if for no other reason.

Thus, the national brand would enter the grocer's warehouse at a cost level above that of the unadvertised, unpromoted store-owned

brand.

Secondly, it is contestable that cost savings are available through warehouse delivery, at all. An empirical review of the warehouse oper-

ation raises serious doubts as to the possible savings.

And lastly, we cannot imagine what possible incentive the chain would have to reduce the premium standing of the national brand product and thereby take away the umbrella that permits its unpromoted brand to exist.

It is clear that no other national brand food product has ever yet been priced as low as the retailer's brand, regardless of the system of distribution used.

As for the small grocer, we believe that competition for the business of small food stores would all but disappear, at least in the near term, due to the demise of the small bottler.

Today, driver salesmen, paid on sales incentives, haunt every small

grocer in competition for his shelf space.

If the small grocer had to turn to his small independent wholesale supplier for soft drinks, his choice would be severely restricted and his selection minimal. Consequently, they could carry but a few of the major brands, which would curtail consumer choices in terms of today's availability.

Fifth, we believe that if the territories fall, pressures will be generated, which will tend to increase the costs of soft drinks to the

consumer at an accelerated rate.

We have already set forth how higher concentrations will take place at both the producing and retailing levels for soft drinks. Much larger and far fewer bottlers, selling to chains that dominate home market retailing, will result in upward pressure on prices, in our view.

Elimination of the territories and adoption of the chainstore distribution system would quickly terminate the existence of the eco-

nomical returnable bottle.

This package is the most economical package on the market today. In 1971, it accounted for 60 percent of the packaged soft drink sales of franchised bottlers.

It enables the advertised national brand to compete on an ounceequivalent basis with price levels of the unadvertised store-controlled brand.

It is quite impossible to believe the chains are going to feed empty

returnables back into the warehouse level.

If we could suppose a two-way flow of millions of returnable bottles through a warehouse system, it would seem clear that present economies of container reuse would be more than exceeded by the additional handling and transporting burdens.

Because of the deposit system and the requirement for returnable bottles to remain predominately in the market of the bottleowner, a system of territorial limits is essential to the survival of this package.

Despite the growth of one-trip containers in highly urbanized centers, the returnable package is a healthy, popular package in most soft

drink market areas.

Should the FTC complaints succeed, this consumer choice, and the lower price it represents, will be lost. Based upon the differential of container costs only, replacement of all returnable sales by one-trip sales, as required by warehouse delivery, would add \$1.1 billion to the annual production cost of soft drinks, assuming no sales growth.

Prices to outlets not served by chain warehouse distribution will increase. We have thus far been considering only 33 to 38 percent of the product delivered to the public. What of the bowling alleys, the filling stations, the beauty parlors, and the hundreds of thousands of vending machine locations and other retail outlets?

They will either go entirely unserved, as the remaining bottler loses his incentive to attend to small accounts, or they will be served at a

higher wholesale and retail price level.

The large regional or national soft drink manufacturer, likely, will not be structured to serve them, nor will be have any economic incentive to.

This void, possibly, could be filled by the creation of an entirely new level of distributorship similar to what now exists in the beer industry.

These businesses, of course, would buy the product at the level set by the only manufacturer of the brand within economic proximity of the market. The distributor would add his overhead, distribution, and profit, and make it available to some of the retail outlets which now carry the product.

This almost certainly must be at a higher price than at which it is

available to the retailer today.

Thus, with 65 percent of the product increased in price to consumers, and product choices reduced severely, who has been served by warehouse distribution other than the super chain store?

Now, Mr. Chairman, I would like to, briefly, summarize.

One, we have shown how, through the operation of very natural economic, historic, and technological limits, this industry evolved to its present status. It originated locally and has remained local, not through conspiratorial means, but as a product of pervasive competitive practices.

Two, we have demonstrated that the local entrenchment of the industry, enhanced by territorial arrangement, has resulted in intense interbrand competition, unmatched product availability, low competitive prices, and widespread consumer choices of soft drink products.

Third, we have shown that the territorial limitations in the franchise contracts have not resulted in rigid and archaic market delineations, but rather that industry markets on the whole have been in perpetual motion, adjusting naturally and consistently to changing economic and demographic configurations.

Fourth, we have documented, we believe, that the local soft drink manufacturer is a healthy, sound economic contributor to thousands of local communities which he serves efficiently and in a manner that cannot be replaced by any other known single distribution system, ex-

cept at higher prices to the consumer.

Fifth, we have pointed out, and corroborated with reliable documentation, that success of the FTC complaints will needlessly destroy the great majority of these businesses throughout the Nation, with no clearly identified benefits to consumers.

Sixth, we have identified specific and realistic consequences of success of the FTC complaints, which would both increase soft drink industry concentration and bring upward pressures on prices to the

majority of consumers.

And we hope, Mr. Chairman, that we have been able to demonstrate to the committee and to the Congress than this industry, composed as it is of many, small, independent, healthy economic units, vigorously competing in every nook and cranny of the marketplace today, represents the kind of enterprise the antitrust laws were designed to protect, and that a restatement of that intent by favorable consideration of S, 3133 is necessary.

Thank you very much for this opportunity to be heard.

Senator HART. Thank you very much and thanks for the summary. Certainly, as we go along today and the other days, as my questions will indicate. I am the consumer of your products, but how it gets to me, I haven't the foggiest idea. I apologize now for some questions and some comments in the hours ahead that may be stupid.

Now, to give me a better idea of a typical bottler, would you describe the bottling operation as your bottling operation, how many cases a year are manufactured by each.

Mr. RAINWATER. I would be delighted to. Let me get the figures.

Senator HART. I can revert to an appendix which has also been printed as part of the record in which you do give us some measure of the rule.

I was curious about yourself, the reason I asked that. You have been

described as one of the most successful of the men in the field.

Mr. RAINWATER. You are very kind. Thank you, sir.

I am president of seven separate bottling corporations and, if I may, I will just give you a brief description of each one: Hygeia Coca-Cola Bottling Co. with headquarters in Pensacola, Fla., has a production plant in Pensacola, Fla., and one at De Funiak Springs, Fla.

We also operate a sales center at Atmore, Alabama and Valparaiso, Fla. We serve 375,000 people, this particular plant does, and has 5,300 customers, including several military accounts, and an annual case

volume of 3 million cases.

What else would you like, Senator, regarding that operation!

Senator Hart. That is one company.

Mr. RAINWATER. That's one company of which I presently serve as

a manager.

Senator HART. The reason I pursued it, a few years ago, the trade press said that you were the owner or president or director or operator—I don't know, from my notes, how to describe it—of 17 highly successful Coca-Cola bottling companies in Florida, Georgia, Alabama, South Carolina and Texas.

I wonder if that is true today.

Mr. RAINWATER. It is not entirely correct. The statement was not

entirely correct in the press in the first place.

Senator HART. What I am trying to get at with my first question is, how many of these things do you have, where do they serve, how many people, how many cases a year?

Mr. Rainwater. Very good.

Let me make it quite clear. I am not the sole owner of any of these corporations. I am a small stockholder in some of the corporations. I do represent some stock as a trustee in some of the corporations, but I serve as president of the corporations, and I am not the sole owner or proprietor. I'd like to make that quite clear.

The second company that I am president of, at the present time, is the Alabama Coca-Cola Bottling Co., with headquarters in Anniston, Ala., and a plant at Gadsden, Ala. They have sales centers at

Sylacauga, Ala., Wedowee, Ala., and Albertville, Ala.

That particular plant serves a population of 410,000 people, has 6,400 customers with an annual case volume of 3,600,000 cases. These

are 1971 complete year figures.

I am president of the Beaumont Coca-Cola Bottling Co. in Beaumont, Tex. And this illustrates one of the points of confusion. I am sure, in the magazine article. There was a bottling plant at Port Arthur, Tex., a production center, and one in Beaumont, Tex. Due to the close proximity of the two buildings, we closed the one in Port Arthur and combined all of the operations into Beaumont. So the Port Arthur plant facility has been closed.

It serves a population of 457,000 people, has 5,700 customers, and an

annual case volume of 2,800,000.

I am president of the Columbia Coca-Cola Bottling Co., Columbia, S.C. It serves a population of 394,00 people, 4,100 customers, and has an annual volume of 2,200,000 cases.

I am president of the Paris Coca-Cola Bottling Co., Paris, Tex. It has a warehouse or a sales center located in Hugo, Okla. This territory serves a population of 75,000 people, 1,448 customers, with an annual

case volume of 572,000 cases.

I am president of the Abbeville Coca-Cola Bottling Co., Abbeville, S.C. It serves a population of 21,000, and has 356 customers. It does an annual volume of 147,000 cases.

I am president of the Bastrop Coca-Cola Bottling Co. in Bastrop, Tex. They serve a population of 18,000 people. They have 250 dealers

or customers. They have an annual sales of 98,000 cases.

Now, to try to explain the statement for the magazine that you read, and the statement was not quite correct to begin with, at one time we did own some smaller plants that have been sold. I think this article was probably written before our interest in these plants was sold.

The Columbia Coca-Cola Bottling Co. has had a merger between two plants. There was a little plant in Newberry, S.C., that has been merged into Columbia. So there has been some merging and consolidation within these companies. And going back to the date of the articles, there have been some sold.

Senator HART. It would be helpful if you would explain this—in a little more detail—evolution. Coca-Cola is in the process of consolidation, the economies of scale and so on, the justification—

Mr. RAINWATER. You mean the Coca-Cola Co.?

Senator HART. Yes, as I understand it.

Mr. RAINWATER. I, of course, can't speak for it.

Senator HART. Well, to the extent that your actions have been a part of this broader picture, maybe you can help us with it.

Mr. RAINWATER. I'd be delighted to try. Let me go back in history, if

I may.

My father started with the Coca-Cola Co. in 1901 and he was able to acquire an interest in the plant at Athens, Ga., in 1903. He moved to Athens, Ga., and was a bottler in Athens, Ga., from 1903 to 1907, at which time he was able to purchase an interest with a cousin, I've been told, in the Augusta, Ga., plant.

However, prior to my father's moving to Augusta, Ga., Mr. Whitehead of Chattanooga, Tenn., died. He, along with Mr. Luptin and Mr. Thomas, held the bottling rights for Coca-Cola. They asked my dad to come back and to run that company because of Mr. Whitehead's

death.

I can't give you the exact dates on all this, but it dates back to 1907. My father, along with an uncle, J. Henry Edwards, purchased the Alabama Coca-Cola Bottling Co., and several of their friends went in with them as stockholders in the company.

At the present time, I personally own one share of stock in the

Alabama Coca-Cola Bottling Co. out of 1,000.

My father had attempted to get someone to bottle Coca-Cola in Beaumont, Tex. for 4 years. When he couldn't get anybody to bottle there for 4 years, he and my uncle decided to buy that territory, or to start bottling in that territory, and they obtained a franchise for Beaumont, Tex. in, I think, 1913.

Unfortunately, they lost money for the first few years, as he's told

me several times. It has now become a successful operation.

Senator HART. Several of the plants that you have mentioned do annually less than a million cases a year.

Mr. Rainwater. Yes, sir.

Senator HART. Our inclination is that Coca-Cola believes that the minimum efficient plant operation requires a million cases a year.

Mr. RAINWATER. I am under the impression that maybe some of these figures were derived by theoretical people who were thinking in terms of convenience packaging rather than in terms of returnable bottles.

Let me state for the record that we make money on each of our operations, and we have consistently, over the years, and we are continuing to operate at a profit this year.

Senator HART. Do you have any idea, or the association any idea,

how many present Coca-Cola bottlers run a million-case plant?

Mr. RAINWATER. No, sir: I do not. We don't get exact sales figures for the national association. I mean, this would be a little bit presumptuous on our part as a national association to pry into the exact sales figures of each of our members.

Senator Hart. In the several transactions that you have described, no reference was made to any assistance that you had from Coca-Cola itself. In either the consolidation in Texas that you mentioned or other acquisitions, has Coca-Cola been a contributor—have they assisted in

any aspects?

Mr. RAINWATER. No, sir; they have never insisted that we do anything of this type. However, they do have engineers and technical people, and we go to them to get advice and help in making economic studies and things of this type to determine whether or not it is a feasible thing to do. And, in this respect, it is a joint effort.

Senator Hart. Mr. Bangert, who is familiar with this aspect, has

some questions.

Mr. RAINWATER. I think it should be stated for the record that I am a minority stockholder in all of these companies. I mean, if there is any question in anybody's mind. I have a stockholder's list here if you would like to see it.

Senator Hart. Thank you. I am sure the statement is correct.

Mr. Bangert. Mr. Rainwater, the impression we have gotten from documents obtained from Coca-Cola, is Bottlers Consolidation Department would indicate that you are one of the main bottlers that they considered as being able to assist in consolidation of the various smaller bottlers.

For instance, in a memorandum dated March 10, 1967, from a Mr. Wimberly—I am sorry—from Mr. Overend III to Mr. Wimberly,

it says:

This past month has been quite significant in the number of indications that the project is finally building momentum, specifically, the sale of Columbia to the Rainwaters breaks the log jam in the center of the state and puts the project on a flexible position, vis-a-vis some of the peripheral plants. (See p.—.)

Then, in January of 1967, the yearend summary—I am sorry—in January of 1971, and this is a yearend summary for the year 1970,

this is a document from George Tripp to Richard Harvey. They said meetings were held with the following bottlers' group:

Eastern Area Bottlers from New Hampshire, Vermont, and part of Maide, Orangeburg and five adjoining small sub-Carolina bottlers. This group should probably look to Columbia as its production center, but wanted a center of its own.

As I understand, Columbia is one of the Rainwater plants, is that correct?

Mr. RAINWATER, I don't know that that would be a correct statement to say it is a Rainwater plant, but I guess you could call it that if you want to.

Mr. Bangert. It is part of a so-called Rainwater group, as I

understand.

Mr. RAINWATER. Right. I just wanted to clarify it. You kind of put a stigma on it. I guess that would be correct. Could I go back? You have got two different questions here.

Mr. Bangert. My question really is that, throughout these documents, Coca-Cola seems to be working with Rainwater in order to

put together various consolidations.

Mr. RAINWATER. I think this is very logical when you stop to consider we have one of the best operations in the industry as far as doing a good job for the Coca-Cola Co. I think it is only natural that if there is a territory that becomes available, they are going to want to put an aggressive person in there to operate that territory.

I think I should state for the record that regardless of what the memorandum shows, I have never been able to acquire the territory around Columbia. The original territory I went in there with was Newberry, S.C., and Columbia, and that is all that the territory has

been expanded.

Now, I have negotiated with some of my neighbors, but that has been a negotiation between my corporation, the Columbia Coca-Cola Bottling, and Orangeburg. We bid. They took bids to sell the Orangeburg Coca-Cola Bottling Co., and we bid on it, but we didn't get it; some-

one else got it.

Mr. Bangert. Well, in your statement, you indicate that if this bill is not passed, the result is going to be consolidations of the bottlers and the large plant operations. And I am wondering if that is not the trend, or that is not the trend that Coca-Cola sees, and Coca-Cola is trying to get the bottlers, such as yourself, that are aggressive, to consolidate these small-type operations into large units.

Mr. RAINWATER. I think there has always been some talk of con-

solidation and mergers, if it could create more efficiency.

I think you must realize production problems are greater today because of the necessity to produce the various packages and package sizes. It is a much more complicated business today than it was 10 or 15 years ago. And this has naturally caused some consolidation of production.

The Columbia plant, by the way, has assisted some of its neighbors by producing for them and selling them products. The plant in Columbia produces and sells products to Orangeburg because they do

not have the equipment to manufacture certain sizes.

Mr. Chumbris. Would you yield just a second?

Mr. Bangert, Sure.

Mr. Chumbris. Mr. Rainwater, the suggestion is if this bill does not pass, why, that might happen. But what you are trying to do is give the man the privilege, if he does not want to consolidate, to run his little business, even though it is a smaller business.

Mr. RAINWATER. I think the point ought to be made clear here. Any consolidations or mergers that we have done have been with the mutual consent of two parties, and haven't been by any coercion.

And, as I see it, if this bill does not go through, taking this particular group of plants, as you wish to call them, the Rainwater organization or whatever you call it, only survivor of the group might be the Columbia Coca-Cola Bottling Co.

I think I ought to make it quite clear, I am not a party to the FTC action. The FTC has brought action against the Coca-Cola Co., and I have a contract with the Coca-Cola Co., and yet FTC has not

included me in. That is the reason we are up here.

I think Bastrop Coca-Cola Bottling Co. will be swallowed up without a bill like this, and maybe by Austin; Beaumont, Tex., will be swallowed by Houston; Alabama Bottling Co. will be swallowed up by Birmingham; Paris Coca-Cola Bottling Co., possibly by Dallas; and I do not know where Abbeville Coca-Cola Bottling Co., South

Carolina, will go; maybe to Greenville.

Mr. Bangert. Well, several of those who are opposed to this legislation—we'll hear from a smaller bottler later today—have indicated that if legislation is passed, it will hasten the demise of the small bottler in that those bottlers cannot now reach maximum efficient level of production because of their limited territories, so that they, therefore, cannot take advantage of the changing technologies and that they will have to sell out their business to other bottlers, so that the territories can be consolidated. How do you react to this?

Mr. RAINWATER. If the FTC complaint is sustained?

Mr. Bangert. No, if this bill is passed.

Mr. RAINWATER. I think I was taking it as—if you don't mind, re-

state the question so that I will be sure I understand it.

Mr. Bangert. Mr. Foster, from Taft, Calif., will testify later. As I understand his statement, he says he serves, I think approximately 20,000 people, and that if he is going to take advantage of the new technology so that he can produce the product at a lower cost, he has to expand because serving only 20,000 people won't permit this type of expansion. So he says, if I could go outside of my territory and compete in other people's territories, I am willing to compete, and then I think I can get the business and I can expand, and this will permit me to stay in business.

But if the bill is passed and I am locked into that 20,000 territory,

I just cannot continue in business.

Mr. RAINWATER. My opinion is that Mr. Foster is better off with the bill being passed because he does have some protection now. If you do not pass the bill and if the FTC succeeds in its complaint, then what is to keep Los Angeles, or whoever Mr. Foster's neighbors are, from coming into his territory and wiping him out? He will be completely out of business.

I mean, they are not going to stand by and let him just run over into their—the larger territory. He is not going to have the capital

to fight it; not if he is a small bottler.

Mr. Bangert. As I understand the Commission's proposed order that was recently filed, what they would do, under that order, is to really lock in the large metropolitan bottlers and say. "You can't go outside of this territory," but they permit the smaller bottler to sell into that major area, so that under that order, what Mr. Foster's condition would be, Coke of Los Angeles could not raid his territory but he could raid Coke of Los Angeles' territory.

Do you think that type of an order would assist the small bottler? Mr. RAINWATER. If you do not mind, let me just comment on the—

I think you are referring to the proposed summary judgment.

Since you brought it up, I would like to comment on it. We just received a copy of it. I think it just came out. It was printed, I think, last week. And, frankly, I tried to read it, and I find it to be very complex and very unclear as to exactly what they are talking about.

Now, I have not had an opportunity to discuss this summary judgment, this proposed summary judgment, with my board of directors; and, therefore, I am not speaking for the National Soft Drink Associa-

tion. I am speaking as an individual bottler.

I think, however, as an individual who heads up several small companies, I am really appalled by the proposal. The FTC, I think, makes its complaints against the franchise companies, and the companies that I work for are not parties to the complaint.

And here again, they are attempting to tell us how they are going

to run our business in the future.

It appears that FTC is attempting to restructure the plants I work for without ever permitting them to be heard. It seems to me that FTC is attempting to legislate. And, frankly, that is why I hope our in-

dustry can get congressional relief.

My brief study of the proposed summary judgment leads me to the following conclusion: First, it is not too well thought out and, therefore, it seems to be an impractical and artificial approach: second, frankly, I doubt the economic soundness of the artificial market classifications; third, it seems to be the plan to create an opportunity for backward integration; and fourth, bottlers within a given market might fall into different classifications and thereby be operating under different rules.

And, frankly, gentlemen, as a small bottler, I want less Government control, not more. I am not seeking new regulations, rather, I am ask-

ing you to help us escape FTC's so-called "help."

Senator Hart. For something you just discovered a few days ago

you have given considerable thought to it.

Mr. RAINWATER. I scribbled this out about 11 o'clock last night,

Senator.

Senator HART. This might be—whether it is good or not, we have to take a recess. The buzzer has indicated the Senate is engaged in a roll-call vote on certain gun legislation. Whether we like it or not, we have to vote on the issue. May I suggest, then, a recess. It usually runs around 10 minutes, then we will come back.

Mr. RAINWATER. Thank you.

(A short recess was taken.)

Senator HART. The committee will be in order. Those 10 minutes never work out, you always get trapped.

Mr. Bangert?

Mr. Bangert. Mr. Rainwater, you have referred, throughout your testimony, to the small bottler, and I assume you consider yourself a small bottler.

When we were in recess, we went through the figures you gave us concerning your operation. Our rough indication is that you sell about 11.4 million cases per year and you serve about 21½ million people.

Contrast this again with our next witness who serves 20,000 people—and I guess it all depends on what your definition of "small"

is.

Mr. RAINWATER. I think, first, we ought to be sure we understand that we operate seven separate corporations and nine separate producing centers. The seven corporations are not contiguous in any way. The territories don't join and, therefore, they are separate entities.

Now, the plant I described to you at Bastrop, Tex., is not any different in size than the plant that I think your next witness, or later witnesses, is going to talk about. One plant I described to you has

21,000 people, another one has 18,000 people.

And to give you another indication as to the size of these operations, I think it would be interesting to note the total number of employees that these different operations employ. One of these plants has 10½ people on an average. If we average our figures, we have 10 part of the year and maybe 11 part of the year, so it averages 10½. The other one averages 7.75 employees. So they are pretty small.

And we think we are quite knowledgeable about small operations, and I think under any classification that I have ever seen by Small

Business Administration, we classify as "small business."

Mr. Bangert. Of course, American Motors is classified as small business, too.

Mr. RAINWATER. It is? I did not know that.

Mr. Bangert. I would assume that Coca-Cola, if they consider you small, probably does not believe that you are going to stay small because, again, in one of the documents received from the Coca-Cola's bottlers consolidation department, they talk about having individual meetings with the following key bottlers for purposes of consolidation discussions, and Crawford Rainwater is there listed as one of the key bottlers.

Mr. RAINWATER. Would you like me to comment on that?

Mr. BANGERT. Yes, sir.

Mr. RAINWATER. I have been invited to attend a meeting in which some of their economists and some of their theorists at The Coca-Cola Company expounded their idea or plan, you might call it, as to what they thought would happen in the future if the trend continued toward

convenience or one-way type packaging.

And they asked us if we would consider the plan and we told them we would look at it. And that is what we did. But I think I should emphasize to Senator Hart and all of the gentlemen on this Committee that the Coca-Cola Company has a lot of plans, but I do not have to accept them and I do not. I take the ones that I want and I don't take the ones that I do not want. I am completely independent in making my own decisions.

Now, I think, to carry this one step further-I do not know if the memorandum mentions a specific situation. I think it is probably Pensacola and Mobile. It ought to be on the record that the Mobile plant considered the matter. We considered the matter. We both turned it down. We did not think it was the right thing to do. There were a lot of differences and we did not think it was an economical thing to do, very frankly.

It would have meant we would have had to haul 3 million cases of product an extra 60 miles, and we did not think that it would justify

that.

The Mobile plant is just ready to let a contract, or has already let a contract for a new facility and I have got a new one on the drawing board in Pensacola. We are going to build independent plants.

Well, now, I will tell you, if I do not have any protection under this franchise, I am not thinking about recommending to my directors

that we spend some \$3 million for new plant and facilities.

Mr. Bangert. I get the impression from these documents that you have been in several meetings with Bottlers Consolidation Department and I am wondering if you can give a rough idea, say, in the last couple of years, how frequent are these meetings in which you determine whether or not you want to consolidate with someone else?

Mr. RAINWATER. Frankly, I do not recall being at any meeting in

the last two years. It was prior to that time.

Mr. BANGERT. It's January 6, 1971 when they said that they had in-

dividual meetings.

Mr. RAINWATER. Is that 1971? It has been about 18 months ago. That is the last meeting, as I recall. We did meet with the bottlers of Mobile shortly afterwards.

Mr. BANGERT. Have you accepted any of their suggestions for con-

Mr. RAINWATER. I do not think I have accepted any of their suggestions. I mean, putting it exactly that way. We have done some consolidating and I have requested their help on some, but the suggestion did not come from them. We originated the idea ourselves.

Mr. Bangert. What type of help did you suggest or did you receive? Mr. RAINWATER. Really did not require any. I have to see that it will agree to the transfer of the franchise and things of this type. In other words, if there is going to be a new owner of the franchise, you have got to get them to agree to that because they are a party to the contract, things of this type.

Mr. Bangert. Well, is it simply a matter of going to them and

saving. "I would like to buy a Coca-Cola plant and territory?"

Mr. RAINWATER. No: it does not generally come about that way. It comes about because of a death in the family or a plant in a distress

situation or something of this type.

The owner or whoever it might be of the plant contacts you and asks you if you are interested in considering it. Now, there have been one or two instances, in the past, where the Coca-Cola Co. has asked us if we would be interested in talking to someone that has come to them and said, "We would appreciate your finding a buyer for us," but frankly. I do not think we have ever accepted any of them. We have turned down more than we have accepted, let me put it that way. A great deal more.

The only plant we have bought in the last several years is Columbia, S.C. And, very frankly, we bought it because of its problems on the horizon. We have only had the Columbia plant a few years. We bought it from an estate. The plant was in distress. It was in a tough situation.

Mr. Chumbris. For my own information, since I walked in after the questions started, when you refer to "we," are you referring to the

association or are you referring to your corporation?

Mr. Rainwater. I am talking about my corporation, the one I work for. It is very difficult, I think, when you work for a group of people, not to say "we," and I apologize for it. I guess I should say, as presi-

dent of so and so corporation.

Mr. Chumbris. Another point for clarification, are the questions and answers that you are having with Mr. Bangert now, is that a pattern that prevails throughout the industry or does yours happen to be a different situation from most of the bottlers around the country?

Mr. RAINWATER. I do not think my situation is unique in that respect. Mr. BANGERT. What is the total number of bottlers Coke has, do you

know, offhand?

Mr. Rainwater. It is approximately 800. I cannot give you the exact figure.

Mr. Bangert. And yet, Coke lists, as their key bottlers, that they talk about consolidation with, only 18 different bottlers?

Mr. RAINWATER. I am not familiar with that ...

Mr. Bangert. I am wondering, does that suggest a trend to you, that of more consolidations?

Mr. RAINWATER, I am afraid I do not understand your question. Mr. Bangert, There are 800 Coca-Cola bottlers and Coca-Cola has

18 key bottlers that they are talking consolidation with.

Mr. RAINWATER. No. I think they are talking consolidation on the basis of markets—where you have several plants in a given market. Detroit, for example, has two Coca-Cola plants. Now, there is one and two different ownerships. One is in Wyandotte, for example. What is that, 14 miles or something from downtown Detroit? It is practically in the city limits.

Mr. BANGERT. In your statement, you indicate that there will be large numbers of small bottlers affected by the Federal Trade Com-

mission action.

You indicate that 61 percent of these bottlers are located in cities with populations of 50,000 or less. Now, from all of this population, it would appear that Pepsi Co.'s 10 largest franchisees control exclusive territories containing about 55 million people; and that Pepsi-Cola itself, through its subsidiaries, control exclusively territories containing about 40 million people; so that we have almost half of the population of the United States, exclusively served by 10 companies, plus Pepsi-Cola's wholly owned subsidiaries; and the same thing with Coke.

Coke's seven largest franchisees control territories of about 41 million people. Their subsidiaries control territory of about 31 million people. And then, again, if you consider territory controlled exclusively by Coke multiplant bottlers—that is, bottlers who own more than one plant—they control territories altogether of about 145 mil-

lion people.

Now, although this bill has been offered as a solution to small business problems, is Congress not only being asked to protect the small bottlers from intrabrand competition but being asked to protect some

really quite large corporations from this type of competition?

Mr. RAINWATER. Well, in the first place, I have never quite understood the way FTC broke this down. The figures you are using are coming from our Cresap, McCormick, and Paget study. I am sure our classifications are slightly different; and when you get down there to the FTC division of plants, they talk about, as I recall, large multiplant Coke bottlers, and we really do not know which bottlers they are calling large and which they are calling small.

You know, like you mentioned awhile ago, I do not know what is large and what is small. But what about the medium and small multiplant bottler? We think FTC has included all of these folks, these medium and small ones into that same classification, to have come up

with these figures that they have come up with.

For example, the Hygeia Coca-Cola Bottling Co. in Pensacola, Fla., of which I am president. I do not know where they have put me, but I

guess I am a large multiplant operation.

I operate a plant in a town of 65,000 people, and we have a production center and a plant serving 6,000 people, and they are two separate bottling facilities, so I guess that makes us a large multiplant operation.

Mr. Bangert. I would assume, then, if you considered that large or small, at any rate, you at least should have the protection of the bill.

How about the New York Coca-Cola Bottling Co., for instance, that controls the entire city of New York and Puerto Rico, should that company be given special legislation that would say, "No one else can come in and compete for the Coca-Cola business in New York City and Puerto Rico"?

Mr. RAINWATER. Well, who else could?

Let me say this. What you are concerned about, in my opinion, is the consumer. The consumer can buy products at varying prices for Coca-Cola, Pepsi-Cola, or any other product that has thousands of outlets in the New York market, and I do not think we ought to overlook that. And concerning concentration of these bottlers, they are concentrated because population is concentrated. This is a rather natural thing. I do not see anything unnatural about this.

Naturally, if you have got a big population, it is going to require a big production center, and it is going to require a sizable transportation and distribution system to serve these consumers. I do not see that

there is any other way it can be handled.

Mr. Bangert. I believe that is all.

Senator Hart. On that last point about New York and Puerto Rico, you suggested nobody could come in anyway?

Mr. RAINWATER. I do not really feel they could.

Scuator Harr. Then, why should we prohibit anybody coming in by law! If somebody could, would it not be a good idea?

Mr. Rainwater. You are referring to the little bottlers outside

coming in? Senator HART. Exactly what you were talking about in the New York situation.

Mr. RAINWATER. I do not believe the small bottler can afford to

come in there and work one of these wholesale grocers.

Senator HART. And then, the New York man does not need legislation for protection against the small fellow. If we are wrong, and the small fellow could come in and put some competition into that market, or should he not?

Mr. Rainwater. I think there is competition there now, Senator.

Senator Hart. I mean, by product.

Mr. RAINWATER. Let us put it this way now. Let us take a situation of an automobile dealership in New York. You have got several Chevrolet dealers in New York City, right? Where do they all buy their automobiles from?

Senator HART. They can sell on top of each other. They do. That is

why you shop around for a car price.

Mr. RAINWATER. The point I am making, is that Coca-Cola is sold at different places in the New York market now to the consumer. The consumer can buy Chevrolets from several dealers. The consumer can buy Coca-Cola from several different stores at different prices in the New York market.

However, the Chevrolet dealer can only buy from a division of the

General Motors Corp.

Senator HART. The Cokes come in through each one of those outlets at a uniform price, do they not?

Mr. Rainwater. Generally, except for promotions, I would say. But

the automobile comes—

Senator HART. The elbow room, in adjusting a price on a wholesale price for a bottle of Coke is compared to the adjustment available on the manufacturer's delivered price. On a Chevrolet, that can amount up to \$5,000. There is a lot more leeway.

Mr. RAINWATER. Could I quote you some prices on the retail market

to the consumer, just last week?

Senator Hart. Eliminating the promotions.

Mr. Rainwater. This is not promotion, but this is just the way the same Cokes—these are the shelf prices in the Pensacola market last week. A 10-ounce returnable bottle six pack sold for 53 cents at A. & P., 54 cents at Jitney Jungle, 55 cents at Piggly-Wiggly, 55 cents at Delchamps, 56 cents at Quik-Check—that's a part of Winn Dixie—59 at Peckaset, 63 cents at Buy-Quick, and 69 cents in the Moms and Pops.

Well, you had a price differential in the Pensacola market last week of 53 to 69 cents on exactly the same package, which is a 30-percent spread; and you can take it on any package and run it through and it is the same thing, it will run this same way.

Senator Hart. You would anticipate those areas which are up in

New York?

Mr. RAINWATER. I am sure they do. The housewife has the right to buy from wherever she chooses.

Mr. Chumbris. Before you yield—

Senator HART. You go out in the neighborhood, further, to look for a Chevrolet than you would a bottle of Coke.

Mr. RAINWATER. That is right.

Mr. Chumbris. In the statistic Mr. Bangert gave you, I once figured out the entire United States, from the Mexican border to the Canadian

border, has less population than New York City. That, to me, becomes irrelevant when you start thinking—we were talking about New York City, now—you are more concerned about the outlying areas where big—Albuquerque, for example, in New Mexico, it has a quarter of a million people, practically has 35 or 40 percent of the entire population of the State.

You are worried about the little towns in the outer part of New Mexico or Arizona or Utah, or Colorado or Nebraska, et cetera. That, I think, is the substance of the testimony and the purpose of this legislation. So, when you start talking about 40 million people, you can get 40 million people by throwing seven or eight of the largest cities in

the United States together.

That is what you are trying to protect against, the big metropolitan city that is going to invade a small town or the medium-sized town.

take the business away.

Mr. RAINWATER. Right, I think, too, concentration is relative. The committee should consider whether or not concentration has resulted in any one of the following things: Has concentration in New York or Chicago, whatever you want to say, whichever market, resulted in higher soft drink prices? Has it limited consumer choices? Has it reduced competition in the market or has it done any other public disservice?

In my opinion, this has not.

Mr. Chumbris. Would you say it is a fair example to say that a small bottler—let us say in a town of around 30 to 40,000 people—would be willing to give up his right to invade Denver or Chicago or New York if Denver, Chicago, and New York would leave him alone?

Mr. RAINWATER. That is exactly correct.

Senator Hart. What about Newark and New York?
Mr. RAINWATER. I do not know who New York—

Senator Hart. I imagine the fellow in Newark does not have a long haul to Manhattan—he is not allowed to go in, might there not be a better than 30 percent spread in the retail prices if he was not there?

Mr. RAINWATER. I think where large chain houses and large warehouses are located is how that argument may come out. I do not know whose territory they are in.

Senator Hart. Thank you very much.

Do you have anything you wanted to add in light of the exchange?

Mr. RAINWATER. I believe not, but thank you very much, Senator

Hart.

Senator HART. Thank you.

Because of the problem we anticipate on the floor, I know it is inconvenient to the witness, but I think we had better try and sit through until we finish, if we can.

(Mr. Rainwater's prepared statement follows. Testimony resumes on

p. 101.

STATEMENT OF MR. CRAWFORD RAINWATER. PRESIDENT, NATIONAL SOFT DRINK ASSOCIATION, BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY LEGISLATION, COMMITTEE ON THE JUDICIARY, U.S. SENATE, AUGUST, 8, 1972

Mr. Chairman, members of the Committee, my name is Crawford Rainwater. I am President of the National Soft Drink Association which represents 1.340 soft drink manufacturers in the United States. These manufacturers are grateful

for the opportunity you have provided in permitting us to present our views on

Senate Bill 3133 and identical bills.

This industry is characterized by a franchise contract embodying territorial arrangements which the staff of the Federal Trade Commission claims to be illegal. In the face of that agency's undertaking, we have come to Congress because we are convinced that the territorial arrangements in the industry are not only legal, but in fact promote competition. We believe we can demonstrate to the Congress that these arrangements work to the service of the public, and if they are destroyed, the result will be detrimental to the public interest.

Secondly, we have sought this examination by the Congress because we believe the bottlers may not survive the arduous and costly process of defending against the litigation which has been brought against the soft drink franchise companies, irrespective of which party wins. Therefore, we seek enactment of law which would remove the cloud of uncertainty which has been cast over the industry by that litigation and which can prevail for years if the litigation continues.

In the course of this presentation, Mr. Chairman, we will: (1) provide a description of the industry today in order that the Congress may clearly visualize its competitive posture<sup>1</sup>; (2) offer a state by state compilation of what the industry contributes to the national economy<sup>2</sup>; and (3) explain what we believe will be the results if the industry is restructured by actions initiated by the

Federal Trade Commission.

Testimony by the Association will be offered in three major components. My statement, and that of Mr. John Strachan, who is a soft drink bottler from the State of New York, will present the industry in terms of operational practices, competitive and marketing features and specific industry conditions. Additional testimony from soft drink manufacturers may be requested to be made part of the record, with the Committee's permission. We understand that the Committee has invited representatives of franchise companies and possibly other bottlers to appear and unquestionably these witnesses also will provide insight to operating conditions in the industry.

A second important part of the industry presentation will deal with the legal asperts of this proposed legislation in terms of antitrust law and enforcement policy. This aspect will be covered by Mr. Earl Kintner, former General Counsel to and Chairman of the Federal Trade Commission, who is Counsel for the Association and who, I understand, has been invited to testify on August 9.

The third facet of our presentation consists of an economic appraisal of the practices of the industry and the likely results of successful Federal Trade Commission prosecution of the Complaints. This testimony will be that of Dr. Lee E. Preston, Melvin II. Baker Professor of American Enterprise, State University of New York at Buffalo, an outstanding authority on the economic relationships of marketing organization and public policy.

From these presentations we hope the Congress will reach the conclusions that we have reached: a law clearly specifying the legality of territorial arrangements in the industry, provided that competitive forces continue to exist, would

clearly be in the public interest.

With me is Mr. Charles Ruttenberg, who is legal counsel to the Association. The soft drink industry was established in America in 1807 by local apothecary and pharmaceutical shops. The prevailing price at the time was six cents a glass. By the close of the first century the product had moved beyond the exclusivity of

these types of outlets and was being sold for home consumption as well.

Many familiar product names were on the market after the turn of the 20th century and franchising had begun as a means of attaining distribution. The Coca-Cola Company had incorporated and begun a program of merchandising in 1892 and by 1904, 123 plants had been authorized to manufacture, distribute and sell this product within specified geographic boundaries, using the Company's trademark. In 1926 the Dr Pepper Company began a franchise program. Seven-Up began franchising in 1928.

It is important to recognize two features of this development. First, at that point in time, these brands did not carry a reputation of success or popularity. Secondly, franchising itself had no prerecognition or acceptance in the commercial community as it does today. In today's environment a franchised product usually commands a fee; but in those days the concept of risking money, effort and reputation to manufacture and sell an unknown product was quite another

<sup>&</sup>lt;sup>1</sup> Appendix I: "A Study of the Soft Drink Bottling and Capping Industry and the Impact of the FTC Complaint on the Industry's Future." Cresap. McCormick and Paget, Inc. <sup>2</sup> Appendix II: "Soft Drink Industry State Profiles—1970." NSDA.

thing. It is very doubtful that local franchisees could have been found at all without territorial arrangements insuring that the fruits of their risks, efforts and

expenditures for local development would not be reaped by someone else.

Some firms began expanding without utilizing a franchising system, shipping their products to wholesale grocers across the country. Shipment to distant points soon became uneconomical because of the cost advantages to local production and the locally used returnable bottle. Consequently, that method of distribution was virtually abandoned in the early 1930's. From then until the mid-fifties, the soft drink industry became almost totally local in manufacturing and distribution.

An understanding of the competitive arena of the soft drink is essential to an appreciation of how this almost unique industry structure took place. Categorized as a "refreshment" since almost its earliest days, the product was never associated with any particular mode of consumption or place of consumption. The desire and need for refreshment is thought of as occurring everywhere: and that basic premise became the religion of soft drink marketing. Since soft drinks can be enjoyed everywhere, we have believed for three generations that the most successful manufacturer will be the one who places them everywhere, readily available to every consumer.

Since there was no distribution system that provided such wide market coverage, and since it was felt that the low price could not support an additional profit level, the manufacturer remained his own distributor, dedicated to capturing

every conceivable retail establishment as an outlet for his product.

The post World War II market brought four major developments which influenced the current industry structure. They include:

(1) Rise of the chain grocer and its retail market dominance.

(2) The one-way container and introduction of store-owned labels.

(3) The restructuring of soft drink markets.

(4) The unprecedented industry growth of 1960 to 1970. I would like to discuss

each briefly.

(1) A great influence on the soft drink industry during the past 25 years has been the growth in size and market power of the chain store retail food supermarket. Much has been written about the competitive leverage that resides in the control of the supermarket shelf space. Soft drinks are universally recognized as a "high impulse" product; i.e., they are most frequently purchased on impulse which is triggered by sight, product association or some other in-store experience. As such they are greatly dependent upon shelf space, both in terms of amount and location.

In the allocation of shelf space to soft drinks, supermarket chains have greatest consideration to national brand products. This practice gave further impetus to franchising. Established local brand bottlers began to seek national products in order to stay in the large food outlet and preserve product exposure. The popularity of franchising increased; and buying and selling of franchises among bottlers accelerated. As a result, the geographic delineations of territories began changing and the number of soft drink manufacturing firms began declining.

(2) The second major development in soft drink marketing during the past 25 years was the introduction of the one-trip container. With the technological development of the metal one-way package, chain grocery stores were quick to realize the potential of the new container for house brands and moved into the production of controlled label soft drinks. This activity gave rebirth to the one-way soft drink package and its subsequent growth.

A major result was the reentry, since the late 1930's, of the marketing of soft drink products through food distribution channels. Such penetration continues at

this time at an increasing rate.

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way soft drink package and its subsequent growth.

A major result was the reentry, since the late 1930's, of the marketing of soft drink products through food distribution channels. Such penetration continues at this time at an increasing rate.

(3) The third post war influence on the industry has been the redefinition of

many markets.

Population growth, greater consumer mobility, abandonment of the family farm, the expanded highway system, urban concentration, and other demographic upheavals, have remade markets in terms of local service. Because market delineations have been changing, soft drink ristribution patterns have been required to change and a number of plant sales, mergers, and plant conversions to sales centers have characterized recent industry history.

(4) The fourth and last significant feature of this current era has been the combination of factors which produced an unparalleled growth of industry sales. Sales of the industry grew at an average rate of 10 percent per year for the decade 1960–1970. This growth attracted the attention of acquisition-minded

firms bringing an additional number of ownership transfers.

The overall effects of the market developments since 1945 can be identified as these: (1) The increased power of the chains strengthened the popularity of franchising through the emphasis on national brands. (2) Availability of the one-way container enabled the easy market entry of store-owned brands as well as national and regionally shipped brands; and further strengthened the retail market position of the chains as soft drink outlets. (3) Larger market spheres for many bottlers were brought about by the growth of urban centers, necessitating greater capital requirements and redefinition of territories. These needs were met by a high degree of mergers, sales, and other inter-industry ownership transactions. (4) High growth rate of product volume began to attract "outside" money for the first time in the industry's history and companies not previously identified with soft drinks began entry into the industry. Availability of this new capital assisted the industry in its accommodation to newly dimensioned markets. (5) The one-way container brought substantial influences on the price of the product in the market. In 1950 the retail price was the same as it was in 1807, approximately a nickel a glass, but as a growing share of product moved to single use packages, the cost of soft drinks has inevitably reflected the higher cost of packaging.

With that brief look at some historical influences on soft drink manufacturers, Mr. Chairman, I would like now to turn to current industry and practices. We have attached as an appendix to this testimony a study conducted by the management consulting firm of Cresap, McCormick and Paget, Inc., commissioned to precisely define the economics at work in this industry and to scientifically measure the impact of the FTC's action, should it succeed. Data used in the following pages of my remarks come from that report and records of the National

Association.

When franchising began, around 1900, there were 2.763 soft drink manufacturers in the United States. In 1970, there were some 2.500 firms in the country manufacturing soft drinks. These firms operated about 3.027 manufacturing plants and an additional 600 to 700 local sales centers.

Although the soft drink market is proliferated with both nationally and regionally distributed brands as well as with the vertically integrated store-owned brands, most soft drinks are still produced for local distribution. The backbone of this industry resides in small towns. Almost 20 percent of the bottlers in the country last year were located in cities of 10,000 to 25,000 inhabitants. Of the 2,878 manufacturing facilities in the country in 1971, 1,765 or 61.3 percent were located in cities with populations of 50,000 or less.

Ownership of bottling and canning companies falls into four principal categories: (1) privately owned; (2) franchise company-owned; (3) publicly held corporations; and (4) subsidiaries of corporations not classified in this industry

by government

In 1971, privately owned bottling companies constituted more than 93 percent of all soft drink companies in the United States. For the most part, these companies have had the same family ownership for decades; and they remain the foundation of the industry.

Franchise company-owned soft drink companies accounted for approximately 5 percent of total bottling companies in the United States last year. These companies are vertically integrated into the operations of the syrup

producing companies.

While we cannot speak for the franchise companies, we do not believe, as a generality, that these companies are anxious to be in the local soft drink manufacturing business. They need to be in a limited way, to intimately understand the economic, operational, and market realities faced by their franchisees. It is practical, also, for these companies to be in the soft drink manufacturing business in a limited way in order to have markets in which testing of new products, packages, and other innovations can be carried on by the franchisor, rather than by one or more franchisees, who have much smaller resources

In addition to these reasons franchise companies usually own some plants for lack of franchisee ownership. This comes about through a variety of circumstances. Whatever the reason for the absence of a franchisee in a market, most franchise companies would operate a local manufacturing plant to prevent being absent from that market for any extended duration. This is because "lost" shelf space is a very difficult thing to regain due to the intense local

interbrand competition extant in the industry.

Last year approximately ten companies in the industry (less than one percent of the total) were publicly held corporations. They are usually located in large markets requiring substantial capital outlays. In most instances they were privately held companies that went public to secure broader capital re-

sources in order to meet the requirements of rapidly growing markets.

In the same year, 1971, approximately 25 soft drink companies were owned by companies whose primary business activity was not directly related to the manufacture and sale of soft drinks. In the 1960's the soft drink industry grew at an attractive rate from the standpoint of sales and became an investment target of acquisition-minded companies. Those companies which have bought into the soft drink industry have purchased large manufacturing entities which provide a greater sales dollars to their total operations. It is unlikely that these firms would seek to purchase small operating facilities in the smaller markets in the country.

In 1967 government figures indicate industry production attributable to such companies was approximately 4 percent of total soft drink production. We cannot determine this percent for 1971 with precision, but even if it were assumed

to have doubled it would represent only 8 percent today.

After considering companies owned by diversified corporations (classified large), those owned by franchise companies (classified large), and those owned by multi-plant companies (both large and small), there remain about 2,000 small, local manufacturing firms serving the United States. These are the companies jeopardized by the FTTC action.

To present a precise profile of the industry in terms of number of companies, number of plants, locations and such, we have attached as an appendix to this statement a tabulation of soft drink plants by state and by number of employees. Data from 1970 is used because it is the latest available to us. Of 3.027 plants,

76.2 percent or 2.287 employed less than 50 workers.

In 1971, there were approximately 75 companies in the country selling syrups and concentrates to these soft drink manufacturers. Fifty-two of these syrup companies had granted at least one franchise for a trademarked product. The 2,878 soft drink plants in the United States in 1971 held more than 8,100 franchises covering more than 180 brand names from these 75 companies, in addition to producing their local brand products. Almost every major franchise license to produce a trademarked brand in this industry has contained a territorial limitation since the practice of franchising began in the early 1900's.

Bottlers in the overwhelming majority do not view these territories as burdensome limitations on their competitive freedom. To the contrary, no other system of production and distribution in the country today has provided so great a product availability to the public, in as many competing brands, at competing prices, while retaining the advantages of local manufacture and the close physical relationship of producer to consumer.

Not only is territorial exclusivity the only way we know to encourage and develop the depth of market penetration which is exemplified by this industry; but it is the only way by which small, independent businessmen would under-

take the extensive risks and responsibilities of soft drink bottling.

The marketing method traditionally used by the soft drink industry has been delivery and service through route selling. This method of selling has produced intensive competition between bottlers of different brands for the trade of virtually every restaurant, food store, filling station, beauty salon, bowling alley and thousands of other outlets within each market; as well as competition for shelf space within the supermarkets.

This same system of route selling has been the only known defense against the enormous competitive power of shelf space control residing in the hands of

the chain grocer.

We believe the typical industry condition of as many as five to ten competing route salesmen calling on the same retail outlets weekly (some even daily), each paid on sales incentives, each trying to obtain a greater share of that outlet's soft drink purchases, week in and week out, throughout every market, adequately demonstrates the extent of interbrand competition. Low prices and unexcelled service to the public at all retail outlets have been the results of this intensely competitive activity.

We believe, Mr. Chairman, that the system has worked exceedingly well. Franchised produced soft drinks are of uniform high quality throughout the country, and compete for consumer acceptance with national brands, local brands, regional brands and store-owned brands. The availability of national brands extends to the smallest and most isolated communities, and the smallest and most out-of-the-way retail outlets in every community, each of which com-

petes with every other for retail sales.

Here in the Washington, D.C. market, for instance, consumers have available to them in supermarkets and convenience stores alone 38 brand soft drink products. These brands offer a multitude of product choices including 24 different cola flavored products in competition. Depending upon the size brand, and package of the unit purchased, there is a total of 17 price alternatives for the same equivalent amount of product (72 ounces). Additionally, there are literally thousands of other retail outlets offering many of these brands at an unestimated number of retail prices. This degree of interbrand competition is not unusual for a metropolitan market of this size.

We believe that the existence of so many brands, in so many locations produced, sold and distributed by so many manufacturers conveys a correct assessment of the intense local competition which exists in the industry. From a broader perspective, we would like to point to two familiar economic indices in a comparative fashion, to demonstrate the competitive vitality which pervades our industry. These are (1) industry concentration, and (2) the number of produc-

ing units.

(1) One indicator, which is cited as indicative of reduced competition, is the degree of sales concentration among companies. Sales in the soft drink industry are not heavily concentrated in a few companies. Department of Commerce figures for 1967 which are the most recent government data, reveal that the 50 largest soft drink companies in the United States account for only 38 percent of total market share. The staff of the Federal Trade Commission provides a more recent figure, 1971, indicating that the 40 largest soft drink producers manage to have only 34 percent of total soft drink sales.

We not only believe this to be an unimpressive expression of industry concentration, it is little more than a product of population density. Large concentra-

tions of people are served by large soft drink manufacturers.

Local concentration, which is higher, is the product of time and circumstance. Until the past ten or twelve years the local bottlers dominated the local market because the exclusivity of the returnable bottle precluded inroads by distant shippers. Recent entry by national and regional shippers and store-owned brands has diminished this concentration. Even now, the distant shipper is only supplying the 33 to 38 percent of the market served by the chain food and convenience stores.

For comparative purposes, we have examined concentration of sales for other similar and kindred food product groups, as published by the Department of Commerce. Of 20 kindred product classifications concentration of sales attributable to the largest 50 companies ranges from a low of 55 percent to a high of 100 percent; in every single instance exceeding the 38 percent assigned to the soft

drink industry.

(2) Related to concentration of sales and lack of competition may be the decline in the number of plants within an industry. Because of the merger and plant consolidations which we have previously described, there has been such a decline in producing units in this industry. Government data concerning loss of plants for kindred food industries shows that the number of establishments in all categories declined 22 percent between 1958 and 1967, and 13 percent between 1963 and 1967. During these same periods the number of establishments in the soft drink industry declined by 23 percent and by 13 percent respectively—a rate almost identical to the total kindred products group.

This almost identical decline in number of establishments in combination with a far smaller degree of sales concentration argues that the soft drink industry is uniquely structured to resist market dominance and preserve competition to

a far higher degree than any other kindred products industry.

We would like to turn now, Mr. Chairman, to the third and final segment of this industry overview and give the Committee our most carefully considered estimates of what would take place in the industry if it were restructured as envisioned by the staff of the Federal Trade Commission.

The results which soft drink bottlers see as following from the destruction of

the territorial system include the following:

(1) The elimination of the majority of small, independent bottlers throughout the nation.

(2) A rapid concentration of soft drink production into large, regional plants.
(3) An increase of soft drink concentration at the retail level, including vertical integration into soft drink production.

(4) No lasting reduction in soft drink prices to consumers.

(5) The creation of pressures for increased prices of soft drinks to consumers.

I would like to discuss each of these points briefly.

(1) We are certain of the elimination of the large majority of independent, small bottlers who are presently active competitors in the industry and who are important economic contributors to their local economies. This result will be accompanied by near total loss of the millions of dollars of investments made by these bottlers in reliance upon long standing franchise contract provisions.

The Cresap study, working in four typical soft drink markets in the United States, confirms that between 75 and 92 percent of the bottlers studied (depending upon customer and variable cost profiles) would not be able to oper-

ate profitably, should the FTC Complaint succeed.

If the territorial system is destroyed as a result of the government's action, warehouse delivery to grocery chains, co-ops and other large volume buyers will become the rule as the Commission staff correctly surmises. This will transpire because these customers will seek the lowest product price in trailerload quantities. FOB bottler's dock, from those bottlers near food distribution centers. The largest bottlers will secure this business because of their economies of scale in production and their physical proximity to the food warehouses. The bottler or canner who can quote the lowest floor prices to one large chain will be able to quote the lowest price to all such major buyers. Thus, a single bottler for each major brand will, in most instances, capture all or nearly all of the retail chain grocery business within any one food distribution area.

Stripped of these high volume, profitable food store accounts, the great majority of remaining bottlers in such a market will be left with only low volume, high service cost accounts. Faced with the necessity to raise prices to what

at best are marginal accounts and suffering the penalties of decreased production efficiencies, these bottlers will simply die. With them, of course, will go the employment, payrolls, tax contribution, purchasing power, banking and

other commercial contributions they make to their local economies.

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other commercial contributions they make to their local economies.

We believe, Mr. Chairman, that the loss of these local businesses can be measured in equally important, if more subjective terms. The local manufacturer has long been traditional to the fabric of American society. His identity with the community, his participation in its life stream, his proximity and answerability to his customers—these things have been and continue to be an integral part of townships throughout the nation. The local bottler is very much a participant in that social and economic mural.

We know also, that the demise of these hundreds of bottlers will result in the loss of millions of dollars of invested capital. These investments were made in reliance upon the legality of the bottler's exclusive trademark rights. As the industry has changed in scope and profile throughout its history, molding its shape to the shape of an ever-changing marketplace, the bottler who sold his business has been remunerated for these investments and these rights. A very large part of the bottler's net worth consists of his exclusive rights. He borrows money and he reinvests his earnings on the basis of the value of such rights. And with these rights stripped away by government action, the value of his business is lost in great measure.

(2) In the event that the territories are lost, there will follow a very rapid concentration of the bulk of the soft drink business into a very few, powerful regional and national soft drink producers. In our view it is absolutely inevitable. The pattern likely would be identical to the trail left by the rise of the giant brewers once the availability of a lightweight container allowed them to expand geographically. With the demise of hundreds of hometown brewers, a very high percentage of national sales quickly came within the share of less than ten

companies.

We also see opportunities for forward integration into soft drink production by the major syrup manufacturers. With local distribution replaced by customer pick-up in trailerload quantities, the surviving large bottler-canner would concentrate solely upon the economies inherent in large scale production. His incentive to develop the local market to its maximum depth would be replaced by lateral expansion into wider geographic spheres. This development would remove the single greatest benefit of the franchise distribution system to the franchisor. With the bottler incentive to fully develop his market gone, the franchisors may have little incentive to remain wedded to the franchise practice. Thus, forward integration into bottling and canning by the large syrup and flavor manufacturers may take place.

(3) We believe, Mr. Chairman, that loss of the territories will bring an alarming increase to the economic power of the major grocery chains to control the soft drink market, thus channeling particular benefit to their store-controlled and

store-owned labels.

Once the individual and total influence of the route salesman for the locally produced brands is eliminated from the individual chain outlets, the chain will be capable of exercising singular influence on the fate of every brand through its control of shelf exposure and location. Because of their dominance of the take-

home market, they are thus provided enormous market advantage with their own brands.

It is quite realistic, also, in view of practices in other product fields to expect backward integration into national brand soft drink production by the chains. Once territories are removed, the chain need only acquire the very smallest of franchises in order to became an authorized producer of the national brand. It could then establish plants throughout its distribution system, not only to produce for its own account, but to sell to other accounts in order to take advantage of economies of scale.

(4) We do not believe there can be any lasting reduction in prices of soft drinks to the consumer. One of the theories used to justify removal of territorial arrangements in this industry is based in the belief that with conversion from local route selling to regional food store warehouse delivery the wholesale price of s oft drinks will plunge to the assigned store-delivered cost of private labeled

drinks. We contest this theory on three counts.

With enormous volume sales in the balance, there would take place an immediate pricing war between very large bottlers for the business of the super chains. We have described how that would affect the structure of this industry. Despite any reductions in the manufactured cost of the product which might be brought about by such activities, the floor price of the national brand could never equal the floor price of the store brand because of the promotion and advertising expenditures which support national brand sales (indeed, all soft drink sales) if for no other reason. Thus, the national brand would enter the grocer's warehouse at a cost level above that of the unadvertised, unpromoted store-owned brand.

Secondly, it is contestable that cost savings are available through warehouse delivery at all. We have never seen a thorough cost analysis tracking soft drink warehouse movements. The one study which does compare route selling costs to warehouse costs fails to include occupancy and inventorying expenses in warehouse costs; and fails to delete retail allocation costs such as stocking, placing of advertising, etc. from route selling expenses. An empirical review of the warehouse operation raises serious doubts as to the possible savings. The soft drink manufacturer load his products, drives them directly to the store, unloads and places them on the shelves. This four-step process would be replaced by (1) loading the product at the point of manufacture, (2) hauling to the warehouse, (3) unloading, (4) in-warehouse handling, (5) storage, (6) rehandling, (7) loading for retail delivery, (8) hauling, (9) unloading and (10) shelving.

It is not likely that the food chain operator has a precise knowledge of the handling costs of any one of his 6 to 8 thousand items. These charges become fused into the total overhead costs of operating the warehouse and are thus borne by all product prices at the retail level. Increased costs of soft drinks incurred by the excess handling and hauling through warehouse delivery would therefore be spread into very small cost burdens over all the items carried.

Lastly, the reduction in price theory clearly embodies the assumption that some cost savings, however theoretical, would be passed along to consumers. We cannot imagine what possible incentive the chain would have to reduce the premium standing of the national brand product and thereby take away the umbrella that permits its unpromoted brand to exist. It is clear that no other national brand food product has ever yet been priced as low as the retailers brand, regardless of the system of distribution utilized.

As for the small grocer, we believe that competition for the business of small food retailers would all but disappear, at least in the near term, due to the demise of the small bottler. Today, driver salesmen paid on sales incentives haunt every small grocer in competition for his shelf space. This service is greatly relied upon by this retailer. The driver salesman delivers the product, stocks the shelves, straightens up the display, puts up point-of-purchase advertising and relieves the

small grocer of many tasks.

If the small grocer had to turn to his small independent wholesale supplier for soft drinks, his choice would be severely restricted and his selection minimal. Independent grocery wholesalers would be buying from the remaining large bottler-canners on quantity orders. Consequently, they could carry but a few of the major brands which would curtail consumer choices in terms of today's availability.

(5) We believe that if the territories fall pressures will be generated which will tend to increase the costs of soft drinks to the consumer at an accelerated

rate.

a. We have already set forth how higher concentrations will take place at both the producing and retailing levels for soft drinks. Much larger and far fewer bottlers selling to chains that dominate home market retailing will result in

upward pressure on prices in our view.

b. There can be little controversy that elimination of the territories and adoption of the chain store distribution system would quickly terminate the existence of the economical returnable bottle. This package is the most economical package on the market today. In 1971 it accounted for 60 percent of the packaged soft drink sales of franchised bottlers. It enables the advertised national brand to complete on an ounce equivalent basis with price levels of the unadvertised store controlled brand.

For years, many chain stores have urged bottlers to abandon the returnable container. With their strong objections to returnables at the retail outlet a matter of record for some years, it is quite impossible to believe the chains are going to feed empty returnables back up into the warehouse level. Farther, if we could suppose a two-way flow of millions of returnable bottles through a warehouse system, it would seem clear that present economies of container reuse would be more than exceeded by the additional handling and transporting burdens.

Because of the deposit system and the requirement for returnable bottles to remain predominately in the market of the bottler-owner, a system of territorial limits is essential to the survival of this package. Despite the growth of one-trip containers in highly urbanized centers, the returnable package is a healthy, popular package in most soft drink market areas. Should the FTC Complaints succeed, this consumer choice, and the lower price it represents, will be lost. Based upon the differential of container costs only, replacement of ail returnable sales by one-trip sales as required by warehouse delivery, would add \$1.1 billion to the annual production cost of soft drinks, assuming no sales growth.

c. Prices to outlets not served by chain warehouse distribution will increase. We have thus far been considering only 33 to 38 percent of the product delivered to the public. What of the bowling alleys, the filling stations, the beauty parlors, the hundreds of thousands of vending machine locations, and other retail outlets?

There are two practical alternatives. They will either go entirely unserved, as the remaining bottler loses his incentive to attend to small accounts, or they will be served at a higher wholesale and retail price level. The large regional or national soft drink manufacturer likely will not be structured to serve them nor will he have any economic incentive to. This void possibly could be filled by the creation of an entirely new level of distributorships similar to what now exists in the beer industry. These businesses, of course, would buy the product at the level set by the only manufacturer of the brand within economic proximity of the market. The distributor would add his overhead, distribution, and profit and make it available to some of the retail outlets which now carry the product. This almost certainly must be at a higher price than it is available to this retailer today. Thus, with 65 percent of the product increased in price to consumers, and product choices reduced severely, who has been served by warehouse distribution other than the super chain store?

We believe these five results of successful FTC Complaints are quite realistic

and clearly would work to the disfavor of the consuming public.

Now, Mr. Chairman, I would like to briefly summarize.

(1) We have shown how, through the operation of very natural economic, historic, and technological limits, this industry evolved to its present status. It originated locally and has remained local, not through conspiratorial means, but as a product of pervasive competitive practices.

(2) We have demonstrated that the local entrenchment of the industry, enhanced by territorial arrangements has resulted in intense interbrand competition, unmatched product availability, low competitive prices, and widespread

consumer choices of soft drink products.

(3) We have shown that the territorial limitations in the franchise contracts have not resulted in rigid and archaic market delineations, but rather that industry markets on the whole have been in perpetual motion, adjusting naturally and consistantly to changing economic and demographic configurations.

(4) We have documented, we believe, that the local soft drink manufacturer is a healthy, sound economic contributor to thousands of local communities which he serves efficiently and in a manner that cannot be replaced by any other known single distribution system, except at higher prices to consumers.

(5) We have pointed out, and corroborated with reliable documentation, that success of the FTC Complaints will needlessly destroy the great majority of

these businesses throughout the nation, with no clearly identified benefits to consumers.

(6) We have identified specific and realistic consquences of success of the FTC Complaints which would both increase soft drink industry concentration

and bring upward pressures on prices to the majority of consumers.

And we hope, Mr. Chairman, that we have been able to demonstrate to the Committee and to the Congress, that this industry, composed as it is of many, small, independent, healthy economic units vigorously competing in every nook and cranny of the marketplace today, represents the kind of enterprise the anti-trust laws were designed to protect and that a restatement of that intent by favorable consideration of S. 3133 is necessary.

Thank you for this opportunity to be heard.

### APPENDIX I TO RAINWATER STATEMENT

A STUDY OF THE SOFT DRINK BOTTLING AND CANNING INDUSTRY AND THE IMPACT OF THE FTC COMPLAINT ON THE INDUSTRY'S FUTURE

## July 1972

This study was authorized by the National Soft Drink Association, the Coca Cola Bottlers Association and the Pepsi Cola Bottlers Association and commissioned through their legal counsels.

#### I .- INTRODUCTION

This chapter describes the background, objectives and scope of the study; discusses the approach used; defines some special terms; and outlines the arrangement of this report.

Background

In July 1971, the Federal Trade Commission (FTC) issued a complaint against several leading producers of soft drink concentrates, charging them with violations of the provisions of Section 5 of the Federal Trade Commission Act. The principal charges set forth in the complaint were that the concentrate producers have hindered and lessened competition in the distribution and sale of soft drink products sold under their trade names by restricting franchised bottlers from selling outside of a designated geographic area. The FTC complaint was accompanied by a proposed cease and desist order requiring the concentrate producers to terminate exclusive territorial arrangements with the bottlers they have franchised to manufacture and distribute their branded soft drinks.

## Objectives and scope

The two objectives to this study were:

First, to conduct a comprehensive economic analysis of the soft drink bottling and canning industry in the United States and to describe the present structure of the industry in relation to other industries and changes over time.

Second, to evaluate the probable impact of the proposed FTC order on the

future of the soft drink bottling and canning industry.

The scope of the study was limited to an analysis of the activities and operations of soft drink bottling and canning companies (Standard Industrial Classification 2086) and did not attempt to resolve any legal aspects of the FTC complaint.

Approach

The approach followed in conducting the economic analysis of the soft drink bottling and canning industry involved an exhaustive research of government publications and documents, association and trade source literature, periodicals and independent research publications. To ensure the completeness of findings, interviews were also conducted with management personnel of bottling and canning companies, industry economic specialists and representatives of major industry suppliers. In addition, the study team drew heavily upon proprietary data which the consultants had obtained through numerous other studies of the soft drink and other food product industries.

The approach taken in evaluating the probable impact of the proposed FTC order on the future structure of the soft drink bottling and canning industry was to develop a picture of the industry before and after implementation of the

proposed FTC order. To do this, four soft drink markets and a number of bottlers within each of these markets were selected as a reasonably representative sample of the bottling and canning operations of the industry. The criteria used to select the four market areas were geographic location, population, the number of bottlers present, size of the bottlers' operations, representation of major brands and presence of store-controlled and local-brand soft drinks. A market area was considered to be a circle with a radius of approximately 100 miles from a metropolitan city center. The market areas selected were Birmingham, Alabama; Oklahoma City, Oklahoma; Pittsburgh, Pennsylvania; and Scattle, Washington. These four market areas encompass parts of nine different states within which s per cent of the population and 11 per cent of the bottling plants in the United States are located.

A central city bottler and between five and seven other bottlers surrounding the central city bottler were interviewed in each market area. This sample represents approximately 1 per cent of the total number of bottling plants in the United States. From each bottler, actual marketing, production, and financial data for 1971 were collected. Only bottlers handling the same brand of soft drink products were interviewed in a given market area; but different soft drink brands were selected for each of the areas. To ensure the confidentiality of bottler data, all the bottlers interviewed and each market area visited were assigned coded identification symbols, and they are not identified in this report.

The findings of the field interviews and the financial data collection were carefully analyed, and the probable sequence of events that would result from a successful FTC action were identified. The probable effects of these events on bottler marketing and production operations and financial performance were developed in concept and studied. A computeried financial model was developed to assist in analyzing bottler financial performance under each of the events identified. This model is explained in detail in Chapter IX of this report. Finally, conclusions were drawn with regard to the probable impact of a successful FTC order on the structure and operations of the soft drink bottling and canning industry.

## Definitions

Some of the special terms used in this report are defined as follows:

Franchise company: a producer of flavoring concentrates or syrups that are used in the production of soft drinks.

Chain supermarket: one of an affiliated group of 11 or more stores that are

supplied primarily from central warehouses.

Grocery and convenience store: small, independent food stores (often called "mom and pop" stores) that carry a fairly full line of products, but with limited selection of brands and sizes.

Food broker: an independent local or regional business that distributes various food products to retail outlets, such as grocery and convenience stores (includes food dealers, food distributors, food wholesalers, food buying cooperatives, etc.). A food broker generally does not represent the products of competing manufacturers.

Variable costs: those expenses incurred in the operation of a soft drink bottling or canning plant that will increase or decrease in proportion to an increase

or decrease in product sales.

Fixed costs: those expenses incurred in the operation of a soft drink bottling or canning plant that will not change with an increase or decrease in product sales.

Store-controlled label: a proprietary brand of a supermarket chain and the name under which the supermarket sells its own products. Soft drink brands included in this category are Cragmont (owned by Safeway Stores), Chek (owned by Winn-Dixie) and Yukon (owned by A&P).

Private label: the brand name of an independent producer who manufactures and sells his products under his own label. Soft drink brands included in the

category are Shasto, Frank's, Vernors and Faygo.

#### Organization of this report

This report is organized into ten chapters and three appendixes, as follows: I—Introduction (this chapter)

II—Summary

III—General Description Of The Soft Drink Bottling And Canning Industry

IV—Characteristics And Structure Of The Soft Drink Bottling And Canning Industry

V-Comparison Of Soft Drink Bottling And Canning Industry With Other

Selected Industries

VI-Markets And Marketing Practices In The Soft Drink Bottling And Canning Industry

VII—Characteristics Of Bottlers Studied

VIII-Impact Of The Proposed FTC Order On Bottler Marketing And Production Operations

IX—Impact Of The Proposed FTC Order On Bottler Financial Performance X—Impact Of The Proposed FTC Order On The Structure Of The Soft Drink Bottling And Canning Industry

Appendix A—Bottler Financial Model Assumptions

Appendix B—Bottler Financial Performance

Appendix C-Soft Drink Price Increases To Non-Food Store Outlets Required To Regain 1971 Pretax Profitability.

## II.—SUMMARY

This chapter summarizes the major findings on the soft drink bottling and canning industry and on the probable impact of the FTC complaint on the industry's future.

Soft drink bottling and canning industry

There were approximately 75 franchise companies in the United States in 1971

Francise companies produce flavoring concentrates or syrups that are used in the production of soft drinks. The 75 franchise companies in the United States marketed approximately 180 different brands of soft drinks in 1971. Fifty-two of the franchise companies had granted at least one franchise for a trademarked product. Fifteen franchise companies owned and operated one or more bottling plants in 1971.

In 1971, 2,878 bottling plants were in operation in the United States

Bottlers are the manufacturers, sellers and distributors of bottled and canned soft drinks. The 2.878 bottling plants were located in 1.584 different cities: 1.062 were located in the South, 746 were located in the North Central region, 659 were located in the Northeast, and 411 were located in the West. Although the distribution of bottling plants tends to parallel the distribution of population, bottling plants are generally located in smaller cities. In 1971, 61.3 per cent of the 2,878 bottling plants were located in cities with populations of 50,000 or less.

Consumer acceptance of soft drings has increased in the last ten years

The soft drink bottting and canning industry attained estimated wholesale sales of approximately \$5 billion in 1971. Per capita consumption of soft drinks has increased steadily in the last decade—from 12.2 gallons in 1961 to 24.0 gallons in 1971. Statistics show a decline in the tendency to consume cola-flavored soft drinks in the period from 1958 to 1971.

Bottling plants are primarily privately owned

Ownership of bottling plants in the United States falls into four categories: (1) privately owned plants, which comprise about 93 per cent of the total; (2) franchise company-owned plants, which comprise about 3 per cent of the total; (3) publicly held corporations, which comprise about 2 per cent of the total; and (4) subsidiaries of corporations not classified in the soft drink bottling and canning industry, which account for about 2 per cent of the total.

Employment, productivity and capital expenditures have been increasing

Employment in the soft drink bottling and canning industry grew at an average annual rate of 2.4 per cent between 1960 and 1970. Thirty-eight per cent of the 120,400 workers in the industry in 1970 were production workers; the remainder were primarily engaged in sales and delivery activities necessary to service retail accounts. Output per production worker man-hour increased at an average annual rate of 6.3 per cent between 1963 and 1969.

Statistical comparisons highlight similarities and differences between soft drink bottling and canning industry and comparable or related industries

Comparisons of the soft drink bottling and canning industry with other selected industries in the food and kindred products group show that the soft

drink bottling and canning industry appears to be similar to these other industries in changes in the number of establishments over time and in the per cent of value added to their products by manufacture. However, the soft drink bottling and canning industry has a relatively higher level of capital expenditures and a relatively lower concentration of sales in its 50 largest companies than comparable or related industries.

Chain supermarkets and grocery and convenience stores account for more than 50 per cent of soft drink sales

The major major retail sales outlets for soft drinks are chain supermarkets, grocery and convenience stores, restaurants and bars, and service stations. The estimated shares of the total soft drink market attributable to these outlets in 1971 were 35, 20, 15 and 12 per cent, respectively.

Returnable bottles are the major package type used by franchised bottlers in the United States

In 1971, an estimated 60 per cent of soft drinks sold by franchised bottlers were packaged in returnable bottles, 23 per cent were packaged in cans, and 17 per cent were packaged in nonreturnable bottles. Aggregate, national statistics on soft drink container usage, which include the sales of franchised brand, store-controlled label and private label soft drinks, show a lower percentage of returnable bottle utilization and higher percentages of can and nonreturnable bottle usage. This situation contrasts with that of franchised bottlers because store-controlled and private label soft drinks are packaged almost exclusively in nonreturnable containers. In general, the price to the consumer is higher for soft drinks packaged in nonreturnable containers than in returnable bottles.

## Impact on bottler marketing and production operations

If the FTC order is upheld, most bottlers would lose their sales to supermarket chain stores

Most bottlers studied would lose their sales to chain supermarket stores located within their areas almost immediately if the FTC order is upheld. Chain supermarket would begin to supply their stores with soft drinks from their own centrally located warehouses. Only the largest bottlers, having appropriate transportation equipment and production capabilities and located in larger cities where most chain supermarket warehouses are also situated, woud be in a position to serve these chain store accounts.

The smaller bottlers would also gradually lose soft drink sales to their grocery and convenience accounts

As a result of a successful FTC order, most smaller soft drink bottlers would gradually lose sales to grocery and convenience stores as food brokers begin to supply the soft drink needs of these retailers. At present, several food brokers in various parts of the country supply grocery and convenience outlets with regional brands of soft drinks. With the absence of territorial restrictions, these foods brokers would soon be in a position to supply national brands of soft drinks to their customers.

The loss of chain supermarket, grocery and convenience store accounts would serverely affect bottlers' operations

With the expected loss of chain supermarket accounts, the decline in most bottlers' sales would average between 24 to 50 per cent of their present soft drink sales, and this would greatly and immediately affect their operations. In the long term, as more and more of the grocery and convenience store outlets are lost to food brokers, the cumulative bottler average sales losses would range between 46 to 69 per cent of their total 1971 soft drink sales volume.

A successful FTC complaint would accelerate the use of nonreturnable containers and intensify ecological problems

The impact of a successful FTC order on soft drink packaging will be to stimulate a rapid movement toward the use of nonreturnable containers, the most expensive form of package for consumers. Chain supermarkets and food brokers would quickly move to the exclusive use of one-way containers. Bottlers contemplating entry into previously restricted territories would also resort increasingly to the use of nonreturnable containers, since returnable glass containers shipped to other areas would probably not be returned to the original

bottler's territory. Thus, the bottlers would lose the substantial financial investment they have made in returnable containers. The accelerated movement toward nonreturnable containers would intensify the ecological problems associated with the use of such packages.

Customer service would decline and the wide availability of soft drinks would decrease

Because of the loss of sales to chain supermarket stores, bottlers would no longer be able to balance a selling route with large and small accounts so that the relatively higher profitability of the former compensated for the relatively lower profitability of the latter. A bottler would be forced either to drop some of his less profitable accounts or to serve them less frequently. In any case, the customer service provided by these bottlers would decline and the wide availability of soft drinks would decrease.

It appears doubtful that generally lower retail prices would result from a successful FTC action

Since one-way containers are substantially higher in price than comparable returnable glass containers, the projected increase in use of one-way containers by chain supermarkets, food brokers and bottlers would place upward pressure on soft drink prices. Further upward pressure would be exerted by the price increases some bottlers would be required to make to heir low-volume accounts, if they were to lose a considerable number of high-volume food store accounts. In addition, as the industry approaches an oligopolistic structure, as a result of the probable elimination of many of today's bottlers, soft drink prices can be expected to increase because of lessening competition. These upward price pressures may be partially offset if chain supermarkets and food brokers request volume purchase discounts when receiving warehouse deliveries, but a decision to pass on such potential savings to consumers would be left to the discretion of the supermarket chains and brokers; however, it may be anticipated that most chain supermarkets would seek to preserve traditional price differentials between national brands on the one hand and store-controlled and private label brands on the other, particularly since many of these accounts offer competing storecontrolled brands.

Reduction in sales volume would sharply reduce bottler soft drink production efficiencies

The probable loss of sales to chain supermarkets would sharply reduce bottler plant utilization and cause fewer and smaller production runs. Poor utilization of production equipment would result in reduced efficiency and higher operating costs, and would ultimately place upward pressure on the price of soft drink products.

Consumers' freedom of choice in scleeting and buying soft drinks would ultimately be diminished

The substantial shares of the soft drink sales controlled by chain supermarkets and food brokers would enable them to restrict the representation of the various soft drink brands within their market areas. Since bottlers would no longer merchandise their products within the chain supermarket stores, the large retailers, by assuming complete control of shelf space allocations within their stores, would intensify their present practice of granting preferential treatment to store-controlled and private labels and decrease the local representation of other brands. Food brokers could also restrict a franchise company's representation within a market since their current practices indicate that they are unlikely to carry more than a few of the many different brands of soft drink products. These actions, by both chain supermarkets and food brokers, would ultimately reduce the consumer's freedom of choice in selecting and buying soft drinks.

## Impact on bottler financial performance

The majority of bottler soft drink operations would become unprofitable

In the event of the loss of chain supermarket accounts, between 75 and 92 per cent of the bottlers studied would probably not be able to operate their soft drink operations profitably. With the cumulative loss of grocery and convenience store accounts, almost all of the soft drink bottlers studied would become unprofitable.

Price increases required to restore bottler profitability are substantial and are unlikely to be accepted by bottlers' remaining customers

After the projected loss of chain supermarket accounts, the median price increase required to return the bottlers studied to their 1971 levels of profitability would range between 12 and 18 per cent. With the further loss of grocery and conevnience store accounts, the median price increases would be as high as 41 per cent over 1971 price levels. These price increases are substantial, and it is unlikely that they would be accepted by the bottler's remaining customers such as taverns, bars, drug stores, and service stations.

The value of most bottlers' investments (both tangible and intangible) in their soft drink operations would be sharply reduced

If, as projected, most bottlers' soft drink activities become unprofitable or if their profitability is substantially lowered as a result of the FTC order, the market value of bottlers' financial investments in their operations would also severely decline. In addition, the projected decline in most bottlers' soft drink profitability could be expected to reduce any incentive for new investments or reinvestments of profits in the soft drink bottling and canning industry.

Impact on the structure of the soft drink bottling and canning industry

Many bottlers would probably be forced out of business as a result of the proposed FTC action

Most bottlers are projected to suffer significant losses in soft drink sales and for many the losses would be great enough to force them out of business. As a consequence of the sales losses, the utilization of these bottlers' production facilities would be sharply reduced. Furthermore, it appears unlikely that their remaining low-volume accounts could be profitably serviced. In such a situation, since neither their bottling nor their distribution activities would be profitable, many of the bottlers probably would not be able to sell or merge their soft drink operations. Thus, they would be forced out of business, and would lose their entire financial investment, if the FTC order prevails.

Some of the surviving bottlers could merge or sell their operations to large urban bottlers, but only at a distressed price

The surviving bottlers, other than those in rural marketing areas, would be faced with an extremely harsh competitive environment. After the probable loss of their chain supermarket accounts, these bottlers could expect a large urban bottler to enter their territory in order to capture some portion of their remaining accounts. To do this, the large bottler would have to invest in and develop additional distribution capabilities. The large bottler could purchase these resources himself, or he could acquire the existing distribution operations of the smaller local bottlers and, thereby, eliminate most of the competition he would face in entering the new market. Because of their poor projected financial and competitive position, the smaller bottlers, who might attempt to sell to or merge their businesses with a large bottler, would be negotiating from a weak bargaining position and could only sell their operations at a distressed price. Such small bottlers, who do sell to or merge their operations with a large urban bottler, would probably have their production facilities closed and their businesses turned into satellite warehouse and distribution points.

At the cost of a sharp reduction in the value of their investment, some of the remaining smaller bottlers could merge with one another and eventually close many of their production facilities

Alternatively, when faced with the same threat of market invasion by a large bottler, some of the remaining smaller bottlers could attempt to consolidate their operations by merging with one another until they formed an economic unit able to compete with the production, marketing, financial and distribution capabilities of the larger bottlers. In such a case, because of the expected decrease in the sales available to the merged unit, the overall value of each bottler's investment in the combined operation would be sharply lowered. The merging bottlers would probably consolidate their production facilities in one location; the non-producing plants would then concentrate solely on marketing and distribution to the remaining outlets within their areas and would, eventually, develop into satellite warehouse and distribution points for the producing plants.

Some of the remaining bottlers could also attempt to become soft drink distributors, but they would lose their substantial financial investment in production facilities

Another possible alternative is for some of the remaining bottlers to attempt to become soft drink distributors; these bottlers would close their production facilities, and only market and distribute franchised soft drink products purchased from large soft drink bottlers and canners. In this situation, the large bottlers and canners would view these soft drink distributors essentially as warehouse distribution points and serve them in the same fashion as the central warehouses of their chain supermarket and food broker accounts. In serving such soft drink distributors, the larger bottlers would be relieved of the organization, management and financial burdens associated with operating a large number of satellite warehouse facilities. In such a case, the large bottlers would have all the benefits of selling their products in an expanded marketing area, while leaving the tedious and costly task of store delivery to small accounts to the former local bottlers. If the bottlers who become distributors survive, they would lose the substantial financial investment they have made in their production facilities.

If the FTO order is upheld, the entire structure of the soft drink bottling and canning industry would be substantially altered with severe economic penalties for most of today's bottlers

Since the four market areas studied generally characterize most of the soft drink markets across the country, similar results could be expected to occur in the remaining soft drink markets in the United States. Eventually, a few large bottlers would dominate the production of soft drink products; they would distribute their soft drink products from their own distribution points or sell them to soft drink distributors. Some of these large producers would also service the chain supermarket and food broker warehouses located in their areas. Most of today's soft drink bottlers would be eliminated; if they are not forced out of business entirely, they would become either satellite warehouse distribution points or soft drink distributors operating at greatly reduced revenues and profits. As a consequence of these events, local employment opportunities would be reduced as soft drink production employees and others are displaced. In addition, these bottlers' important contributions to their local communities, in the form of property and other local taxes, and their numerous community services, would be adversely affected.

III,-GENERAL DESCRIPTION OF THE SOFT DRINK BOTTLING AND CANNING INDUSTRY

The elements of the soft drink industry analyzed herein are two: franchise companies and independent bottlers. The lines of distinction between these two segments are somewhat blurred since some independent bottlers perform some of the activities of franchise companies and vice versa. The general activities of franchise companies and bottlers, the relationship between bottlers and franchise companies, and the size of the industry are discussed in this chapter.

## Franchise companies

Franchise companies are the producers of flavoring concentrates or syrups that are used in the production of soft drinks. For the most part, a franchise company sells flavoring concentrates or syrups to franchised bottlers who formulate branched soft drinks. A franchise company is first a producer of concentrate or syrup and second a franchiser.

In 1971, there were approximately 75 franchise companies in the United States. Thirty-six of these companies franchised their products throughout the United States, and 52 had granted at least one franchise for a trademarked product. The remaining companies produced flavoring concentrates or syrups on a nonbranded basis for distribution to independent bottlers, or produced a branded concentrate or syrup for the particular market in which they were located.

The 75 franchise companies currently market more than 180 different brands and had granted more than 8,100 franchises at the end of 1971. A franchise company with multiple brands normally has separate franchise agreements for each of its brands, and a bottler of its major brand is free to make his own decisions on whether or not to manufacture the franchise company's other brands.

Fifteen franchise companies operated their own bottling plants (in addition to granting franchises) in 1971. In that year, there were approximately 100 franchise company-owned bottling plants in the United States.

#### Bottlers

Bottlers are the manufacturers, sellers and distributors of bottled and canned soft drinks. They purchase concentrate or syrup from franchise companies and manufacture finished products according to specifications established by the franchise company (if they are a franchisee) or to their own specifications (if they are producing their own brands). The bottler must independently make managerial decisions with regard to these functions and, like the true entrepreneur, is solely responsible for the success of his operations. Franchise companies assist bottlers with technical problems but do not make decisions for them.

As a manufacturer of soft drinks, the bottler is responsible for the production of soft drinks from concentrate or syrup and the packaging of the finished product according to quality standards established by the franchise companies and monitored by the Food and Drug Administration. The bottler decides on the plant and equipment to be used, the size of production runs, the size and

types of containers and the production mix.

As a seller of soft drinks, the bottler is responsible for the penetration of a particular market area and the maintenance of some desired market share with respect to competitive products. The bottler must accurately estimate the demand for his products in a particular market area and translate this information into the scheduling of production and the allocation of local advertising and promotion expenditures. Likewise, the bottler must set a price for his products that not only provides an equitable profit on his operations but also is responsive to competition from other soft drinks.

As a manufacture-distributor of soft drinks, the bottler is responsible for ensuring the widest possible distribution of his branded products. Bottlers provide delivery to all types of retail outlets with varying soft drink demand requirements as well as vending machine sales and fountain and pre-mix sales throughout a particular market area. He must also finance all transportation

equipment used in the distribution of his products.

The largest proportion of bottlers are privately owned and situated in small cities. In most cases, the bottler is an important leader in his business and civic community and his operations provide local employment and tax revenue. The bottler responds quickly to the needs and demands of retailers and consumers because of his unique position in the local market.

The ability of bottlers to sell and distribute their products to all retail outlets in a particular market area has made soft drinks easily available to consumers throughout the United States. A detailed analysis of bottlers and their activities

is presented in the next chapter.

## Relationship between franchise companies and bottlers

The franchise company primarily manufactures and sells flavoring concentrates or syrups to the bottlers. Soft drinks acquire their unique taste and appearance qualities from the concentrates or syrups which are the basis of the differentiation among soft drinks. By creating a product with broad taste appeal, by carefully monitoring its quality and by employing successful marketing techniques that use advertising, promotion and other marketing skills, the franchise company attempts to create a brand image among consumers which will result in repeat purchases. If the franchise company can create brand awareness or preference among consumers, then the selling task of the bottler

is made considerably easier. Franchise companies also underwrite part of the local advertising and promotion expenditures related to their products; provide the bottlers with advice and technical assistance on production, quality control, management and sales problems; develop technology and sales programs for pre- and post-mix sales activities; develop new products and packagings; and test market them.

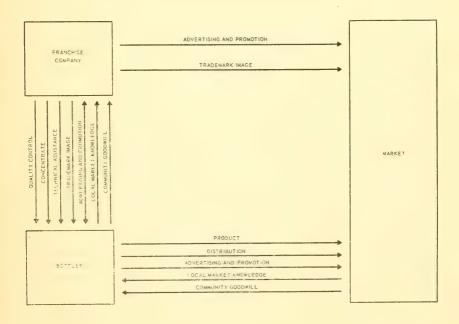
The bottler provides the investment in plant and equipment necessary for the manufacture of a given quantity of soft drinks, develops and maintains a sales and distribution network that is capable of total market penetration and coverage in a given area, shares local advertising and promotion expenditures with the franchise company, decides which franchise products to sell and in what type of packaging, and builds goodwill for the brand name in the community through participation in charitable and civic affairs. Exhibit III–1 shows the major interactions between franchise companies and bottlers in the task of selling soft drinks.

## Size of the industry

The soft drink bottling and canning industry attained estimated sales of approximately \$5 billion in 1971, which was the twenty-sixth consecutive year of dollar sales growth for the industry.

The major determinants of the size of the soft drink industry are population and soft drink consumption patterns. Soft drink sales in the past 20 years have grown at an annual rate four times as great as the rate of population growth—8 per cent versus less than 2 per cent, respectively. Changes in soft drink consumption patterns are caused by a variety of factors, including the age of consumers, the degree of consumer awareness of soft drink qualities, availability of the product, climate, increasing leisure time, product cost and consumer acceptance of new products. Exhibit III—2 shows the increase in soft drink per capita consumption for the period 1961 through 1971.

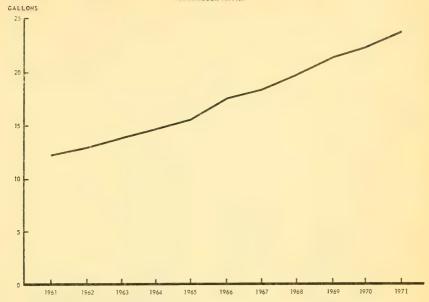
EXHIBIT III-1
RELATIONSHIPS BETWEEN FRANCHISE COMPANIES
BOTTLERS AND THE MARKET



#### EXHIBIT III-2

#### SOFT DRINK PER CAPITA CONSUMPTION

1961 THROUGH 1971(a)



(a)1970 and 1971 estimated by U.S. Department of Commerce.

Source: U.S. Department of Commerce and Standard and Poor's.

# IV.—CHARACTERISTICS AND STRUCTURE OF THE SOFT DRINK BOTTLING AND CANNING INDUSTRY

This chapter describes the soft drink bottling and canning industry in terms of geographic location, ownership, plants and employment, capital expenditures and productivity and market concentration.

#### Geographic location

In November 1971 the United Beverage Bureau counted 2,878 bottling plants in the four major census regions of the United States—Northeast, North Central, South and West. The South had the largest number of plants (1,062) followed by the North Central (746), the Northeast (659) and the West (411), as shown in Exhibit IV-1. Selected characteristics of the four census regions are compared in Exhibit IV-2 which shows that the average number of bottling plants per city, the average number of people served by bottling plants and the average sales per bottling plants are relatively similar.

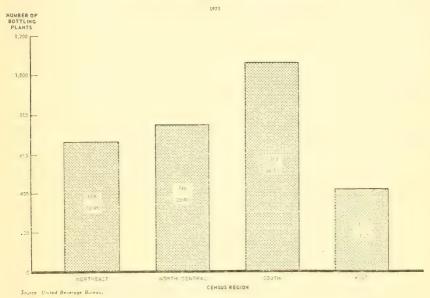
Exhibit IV-3 shows the number of bottling plants in cities by region in the United States. In 1971 there were 1,584 different cities with bottling plants. Exhibit IV-4 indicates those counties that have one or more bottling plants in operation. Although bottling plants are widely dispersed in cities throughout the United States, there is considerable overlap of bottlers' marketing operations in

a given market.

The dispersion of bottling plants throughout the United States is also apparent when examining the relationship between bottling plants and population. The distribution of bottling plants by region and the distribution of population by region in 1970 were as follows:

[In percent]

Region	Population distribution	Bottling plan distribution
North-central South West	24. 1 27. 8 30. 9	22. 9 25. 9 36. 9



SELECTED CHARACTERISTICS OF BOTTLING PLANTS BY CENSUS REGION, 1971

Census region	Number of bottling plants	Number of cities with bottling plants	Average number of bottling plants per city	Population (1970)	Average population per bottling plant	Estimated sales (millions)	Estimated average sales per bottling plant
Northeast North-central South West	659 746 1, 062 411	376 433 563 212	1.75 1.72 1.89 1.94	49, 040, 703 56, 571, 663 62, 795, 367 34, 804, 193	74, 417 75, 833 59, 129 84, 682	\$1, 100 1, 400 1, 900 750	\$2,200,000 1,900,000 1,800,000 1,900,000
Total	2, 878	1, 584	1 1.82	203, 21 <b>1, 9</b> 26	1 70, 609	5, 150	1, 900, 000

<sup>1</sup> Weighted average.

Source: United Beverage Bureau; U.S. Department of Commerce, Bureau of the Census; and Softdrinks.

EXHIBIT IV-3
DISTRIBUTION OF BOTTLING PLANTS BY REGION AND NUMBER PER CITY, 1971

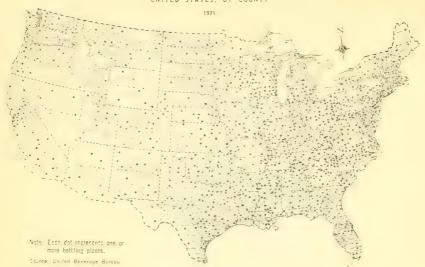
1	Percent of total	plants	36.0	14.4	6.4	3.2	.4.0	1.3		1.4	100.0	
All regions	r of	plants	1, 036	414	185	32	40	36	15	40 21	2, 878	
	Number of	Cities	1, 036	138	37	13	440	78-		1 2 1	1, 584	
	plants	Percent	28.5	14.6 5.8	7.3	2.0%	7.7	2.9			100.0	14.3
West	Bottling plants	Number	117	24	30	2000	0	12			411	
	- N	of cities	117	9 9 07	വ	4	- i				212	
	plants	Percent	32.4	11.3	4.5	1.5	1.0	0			100.0	36.9
South	Bottling plants	Number				21 16 27		•			1,062	
	Number	of cities	344	30	8	223	,	•			563	
	Bottling plants	Percent	40.6	7.5	5. 4 4. 0	3.8	1.3	1 7	2.0	2.7	100.0	25.9
North-central	Bottling	Number	303				10	13	15	20	746	
Ź	Number	of cities	303	14	ഹ ഗ	1		•			433	
	Bottling plants	Percent	41.3	5.5	3,6	2.1	3.0	3.6	9 6	3.3.0	100.0	22.9
Northeast	Bottling	Number	272			1	20	24	17	20 21	629	1 1 1
	Number	of cities	272	67	04	2	2	2	-		376	1
		Number of bottling plants per city	2	4	9	8		12	15	20.21	Total	As a percent of total bottling plants in the United States

Source: United Beverage Bureau. Lyample explanation: The northeast region has 29 cities with 3 bottling plants; the 87 plants in these Unit

29 cities comprise 13.2 percent of all bottling plants in the region. Similarly, there are 138 cities in the United States with 3 bottling plants, which is equivalent to 14.4 percent of all bottling plants in the United States.

EXHIBIT IV-4

LOCATION OF BOTTLING PLANTS IN THE
UNITED STATES, BY COUNTY

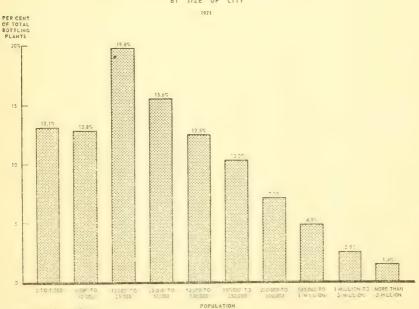


Since the industry produces a food product, it is not surprising that a geographic relationship exists between production (plant distribution) and consumption (population distribution). What is surprising, however, is the distribution of bottling plants by the population of cities in which they are located. Exhibit IV-5 shows that almost 20 percent of the bottling plants in the United States are located in cities of 10,000 to 25,000 inhabitants. Of the 2.878 bottling plants in the United States in 1971, 1,765 (61.3 per cent) are located in cities with populations of 50,000 or less.

EXHIBIT IV-5

DISTRIBUTION OF BOTTLING PLANTS IN THE UNITED STATES

BY SIZE OF CITY



Source United Beverage Suleau.

### Ownership

Ownership of bottling plant falls into four major categories: (1) privately owned, (2) franchise company-owned, (3) publicly held corporations, and (4) subsidiaries of corporations not classified in the soft drink industry. Privately owned bottling plants accounted for about 93 per cent of all bottling plants in the United States in 1971. For the most part, these plants have had the same family ownership for decades, and they are the foundation of the soft drink bottling and canning industry.

In 1971, approximately 100 bottling plants in the United States were owned by franchise companies. This category of ownership accounts for slightly more

than 3 per cent of all bottling plants in the United States.

Approximately 15 companies engaged in the bottling and canning of soft drinks were listed on the New York, American and Over-the-Counter stock exchanges in 1971. These publicly held corporations were reported to own approximately 65 soft drink bottling and canning plants, or 2 per cent of the total number

of bottling plants in the United States.

In 1971, approximately 10 companies whose primary business activity was not the manufacture and sale of soft drinks were engaged in the production of soft drinks through the subsidiary ownership of about 60 bottling and canning plants, or about 2 per cent of all bottling plants. Soft drink production attributable to these organizations accounts for less than 4 per cent of total soft drink production.

Within the classifications of ownership, there are three major types of operations: (1) single plant, (2) multiple plants, and (3) contract. In single plant operations, the bottling or canning facility is not affiliated with other plants in any way. Multiple plant companies have a number of affiliated facilities in a variety of locations. Contract operations generally refer to facilities which can or bottle soft drinks on a contract basis for soft drink manufacturers. There appears to be no strong relationship between the type of ownership and the type of operation, since all types of operations are common to the four categories of ownership.

### **Employment**

The distribution of the 3,001 bottling plants reported by the Department of Commerce in 1970 by number of employees and state is shown in Exhibit IV-6. Total employment in the soft drink bottling and canning industry was 130,400 in 1970, 38 per cent of whom (49,100) were production workers. The high proportion of nonproduction workers reflects the large number of sales and delivery personnel employed by the industry. These workers provide most retailers of soft drinks with order service, marketing and promotion assistance and product quality control through the rotation of stock on the shelves. In 1969, over 60 per cent of all soft drink employees were nonproduction workers, compared with 27 per cent for employees in all manufacturing industries. Total employment in the industry grew at an average annual rate of 2.4 per cent between 1960 and 1970.

Exhibit IV-7 shows the distribution of bottling plants by number of employees. In 1970, 32 per cent of all soft drink plants in the United States had between

20 and 49 employees.

## Capital expenditures and productivity

Capital expenditures in the soft drink bottling and canning industry totaled more than \$100 million annually between 1963 and 1970. The largest proportion of this investment was made in new machinery and equipment, as shown in Exhibit IV-8. Capital investment in new plants and equipment is an important measure of an industry's present vitality and future economic prospects. Capital expenditures per employee in the soft drink bottling and canning industry in creased from \$806 in 1963 to \$1,479 in 1970.

This continuing investment in new machinery and equipment appears to have had a direct impact on soft drink bottling and canning industry output and production. Between 1963 and 19669 industry output increased 8.4 per cent annually despite decreases in the number of plants. Increases in industry employment during the same period were 3.2 per cent annually for production workers and 3.1 per cent annually for all industry employees. Production worker man-hours increased at an average annual rate of 2.0 per cent and output per production worker man-hour increased at an average annual rate of 6.3 per cent, significantly higher than the 3.1 per cent rate of increase for all manufacturing industries during the same period. Detailed productivity data are given in Exhibit IV-9.

EXHIBIT IV-6
DISTRIBUTION OF BOTTLING PLANTS BY STATE AND NUMBER OF EMPLOYEES, 1970

			1	Number of	employees	s			
State	1 to 3	4 to 7	8 to 19	20 to 49	50 to 99	100 to 249	250 to 499	500 or more	Total
Alabama		4	16	25	17	4	1		67
Alaska	2 _				. 1				3
Arizona	3	1	6	7	5	1			23
Arkansas	3	7	20	18	12	2			62
California	18	11	44	42	20	15	2	1	153
Colorado	. 1		10	14	2	3	1		31 47
Connecticut	8	10	6	12	8	1	2		5
Delaware			3		. 1	1			2
District of Columbia				0.4	23	10			106
Florida	/	4	24	34 40	16	10	1 1		85
Georgia	1		15	40		í	1	1	12
Hawaii	2	1	3 7	9	1	1			16
Idaho	12	13	29	28	16	8	Δ-	î	111
Illinois		13	17	26	13	5	2	1	81
Indiana	9 4	9	6	18	5	4	4		37
lowa	4 -		14	11	4	2			35
Kansas		3	16	23	9	1	2		58
Kentucky	3	1	7	25	8	6	2		55
Louisiana	3	7	4	23	1	1	2		29
Maine	1	1	10	15	7	1			39
Maryland	22	14	17	17	10	8			82
Massachusetts	8	17	18	25	12	6		1	80
Michigan	8	ía ía	13	20	6	6	3		62
Minnesota	5	3	22	25	14	1			70
Mississippi	10	7	25	21	9	3	3	1	79
Missouri	10	2	13	4	1	9	J	_	21
Montana	4	5	13	11	4	1			33
Nebraska	1	ĭ		3	2	_			7
Nevada.	3 .	4	6	7	2				18
New Hampshire	22	10	14	13	14	12			85
New Jersey	1	1	10	12	1	ī			26
New Mexico	37	19	47	46	21	16	2	1	189
	1	3	19	47	32	9	_	_	111
North Carcina		ĭ	5	6	OL.				12
Ohio	9	10	17	39	19	14	. 4	1	113
Oklahoma	5	5	20	15	8	3	1	_	57
Oregon	i	ĭ	17	6	ĭ	2			28
Pennsylvania	44	23	38	51	20	9	3		188
Rhode Island	9	2	5	4		1			21
South Carolina.	2	5	16	25	8	. 8			64
South Dakota		1	Ĩ	6	2				10
Tennessee	3	î	14	39	12	7		1	77
Texas	13	8	47	75	36	14	3	2	198
	2	2	10	9	2	i			26
Vermont	2	2	2	4					10
Virginia.	2	4	12	30	13	15			76
Washington	5	i	10	17	4	3			40
West Virginia.	3	4	18	14	8	1			48
Wisconstr	29	17	24	19	10	4	1		104
Wyoming	1	1	6	1					(
Total	338	254	731	964	440	226	38	10	3,001
100012.22222	000								

Source: U.S. Department of Commerce, County Business Patterns, 1970.

EXHIBIT IV-7 CISTRIBUTION OF BOTTLING PLANTS BY NUMBER OF EMPLOYEES

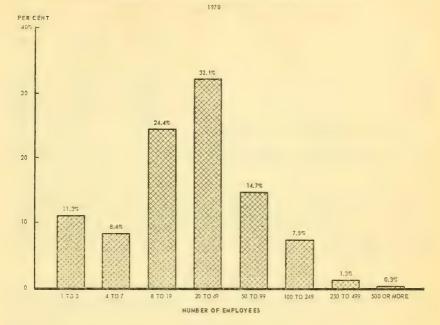


EXHIBIT IV-8

CAPITAL EXPENDITURES IN THE SOFT DRINK BOTTLING AND CANNING INDUSTRY, 1963 THROUGH 1970
[Dollar amounts in thousands]

- Year	New mach equip		New struct additions		
	Amount	Percent of total expenditures	Amount	Percent of total expenditures	Total
1963 1964 1965 1966 1967 1967 1968 1969	\$80, 443 86, 108 88, 843 117, 292 127, 500 103, 300 107, 000	79. 8 77. 7 80. 0 77. 6 75. 8 73. 8 69. 1	\$20, 328 24, 736 22, 193 33, 793 40, 600 36, 600 47, 800 55, 900	20. 2 22. 3 20. 0 22. 4 24. 2 26. 2 30. 9 29. 0	\$100,771 110,844 111,036 151,085 168,100 139,900 154,800

Source: U.S. Department of Commerce, Census of Manufactures, 1963 and 1967; and Annual Survey of Manufacturers, 1964, 1965, 1966, 1968, 1969 and 1970.

#### **EXHIBIT IV-9**

PRODUCTIVITY MEASURES IN THE SOFT DRINK BOTTLING AND CANNING INDUSTRY, 1963 THROUGH 1969 [Units in thousands]

Yea	Output (192-ounce cases)	Production worker man-hours	Output per Man-hour
Average annual rate of growth (1963 to 1968) (percent).	1,800,915	86, 857	20, 700
	1,948,590	89, 200	21, 800
	2,104,282	90, 100	23, 400
	2,352,587	93, 800	25, 100
	2,470,452	95, 300	25, 900
	2,777,035	96, 500	28, 800
	2,913,110	97, 800	29, 800
	8,4	2, 0	6.

Source: U.S. Department of Commerce, Census of Manufactures 1963 and 1967; Annual Survey of Manufacturers 1964, 1965, 1966, 1968 and 1969; and National Soft Drink Association.

The impetus for these capital expenditures, which have had such an impact on productivity, has been the steady increases in per capita consumption, the successful introduction of new products (such as diet drinks and new flavors). the trends toward larger and nonreturnable containers, the growth of vending machine operations, and increased advertising and promotion. These factors contribute directly or indirectly to increased demand for soft drinks and account for the growth of capital expenditures for new plants and equipment to meet the demand.

## Market cencentration

Sales in the soft drink bottling and canning industry are not heavily concentrated in a few companies. In 1967, the four largest companies in the industry accounted for only 13 per cent of industry sales while the eight, twenty and fifty largest companies accounted for only 20, 28, and 38 per cent of total sales, respectively, as shown in Exhibit IV-10. A company is defined to include the operations of all bottling plants under common ownership or control.

The concentration ratios for the various categories, moreover, have not changed appreciably between 1963 and 1967, and in the case of the four largest companies, actually declined between 1966 and 1967. This low concentration of sales in the fifty largest companies indicates that the soft drink and bottling and canning industry is not dominated by a few large companies whose actions could independently affect the market for soft drinks; the industry is based on the sales of many companies of relatively small size.

## EXHIBIT IV-10

SOFT DRINK BOTTLING AND CANNING INDUSTRY MARKET CONCENTRATION IN THE UNITED STATES, 1963, 1966, AND 1967

	Percent of value of shipments accounted for by—						
Year	4 largest companies		20 largest companies	50 largest companies			
1963 1966 1967	12 14 13	17 20 20	24 (¹) 28	34 (1) 38			

<sup>1</sup> Not available.

# V.—Comparison of soft drink bottling and canning industry with other selected industries

This chapter presents selected comparisons between the soft drink bottling and canning industry and similar industries in the food and kindred products group (Standard Industrial Classification 20). Industries outside of the food and kindred products classification were not included because either the manufacturing processes differed markedly from the soft drink bottling and canning industry

Source: U.S. Department of Commerce, Census of Manufactures, 1963 and 1967; and Annual Survey of Manufacturers,

or the finished products of these industries could not be considered comparable to soft drinks in potential end uses. A lack of data precludes comparisons beyond 1967, the year of the last Department of Commerce census; nonetheless, the conclusions resulting from these comparisons are considered valid because the structures of the industries studied do not appear to have changed appreciably in the last four years.

## Number of establishments

Exhibit V-1 compares changes in the number of establishments for the soft drink bottling and canning industry with other selected industries in the food and kindred products group. In general, the number of establishments in all these industries is declining. The number of establishments in the food and kindred products group as a whole declined by 22 and 13 per cent between 1958 and 1967 and 1963 and 1967, respectively. During these same periods the number of establishments in the soft drink bottling and canning industry declined by 23 and 13 per cent, respectively—a rate equivalent to the entire food and kindred products group. Thus, the decline in the number of manufacturing establishments in the soft drink bottling and canning industry appears to be respresentative of the trend for the food processing industry as a whole.

EXHIBIT V-1

COMPARISON OF CHANGES IN THE NUMBER OF ESTABLISHMENTS: SOFT DRINK BOTTLING AND CANNING INDUSTRY VERSUS OTHER SELECTED INDUSTRIES

							Perc	ent of l	increas ease)	e or
SIC		Number	of estab	lishment	s, by cen	sus year	1967	1967	1967	1967
code	Industry	1947	1954	1958	1963	1967	over 1947	over 1954	over 1958	1963
20	Total food and kindred products_	42, 802	42, 373	41, 619	37, 521	32, 518	(24)	(23)	(22)	(13)
2023 2024 2026 2033 2041 2043 2051 2071 2082 2084 2085 2086	Condensed and evaporated milk lce cream and frozen desserts Fluid milk Canned fruits and vegetables Flour and other grain mill products Cereal preparation Bread, cake, and related products Confectionery products Malt liquor Wines, brandy and brandy spirits Distilled liquor, except brandy Bottled and canned soft drinks.	1, 690 1 6, 616 2, 265 1, 243 64 6, 796 1, 686 440 418 226	359 1, 587 6, 687 1, 758 803 46 6, 103 1, 434 301 262 133 4, 643	313 1, 382 5, 816 1, 607 814 43 5, 985 1, 390 262 239 122 4, 394	281 1, 081 4, 619 1, 430 618 48 5, 010 1, 211 222 222 107 3, 905	291 850 3, 481 1, 223 541 45 4, 042 1, 183 185 205 112 3, 400	(35) (50) (47) (46) (56) (30) (41) (30) (58) (51) (50) (39)	(19) (46) (48) (30) (33) (2) (34) (18) (39) (22) (16) (27)	(7) (38) (41) (24) (34) 5 (32) (15) (29) (14) (8) (23)	4 (21) (25) (14) (12) (6) (19) (2) (17) (8) 5 (13)

<sup>&</sup>lt;sup>1</sup> Prior to 1948 fluid milk was classified as "nonmanufacturing:" number of establishments shown is for 1948. Source: U.S. Department of Commerce, Census of Manufactures, 1958, 1963, and 1967.

#### EXHIBIT V-2

COMPARISON OF VALUE ADDED BY MANUFACTURE: SOFT DRINK BOTTLING AND CANNING INDUSTRY
VERSUS OTHER SELECTED INDUSTRIES, 1967

#### [Dollar amounts in millions]

		Value					
	SIC code and industry	Added by manufacture	Of shipments	of value added by manufacture			
20 2023 2024 2026 2033	Total food and kindred products	\$26, 620. 9 373. 1 403. 1 2, 350. 7 1, 413. 3	\$83, 975. 2 1, 263. 0 1, 059. 4 7, 826. 0 3, 467. 8	32 30 38 30 41			
2041 2043 2051 2071 2082 2084 2085 2086	Flour and other grain milk products  Gereal preparations  Bread, cake and related products  Confectionery products  Malt liquors  Wines, brandy and brandy spirits  Distilled liquor, except brandy.  Bottled and canned soft drinks.	491.3	2, 457. 4 793. 0 5, 102. 7 1, 870. 2 2, 929. 7 410. 2 1, 364. 2 3, 173. 2	20 60 54 53 53 48 54 53			

## Value added by manufacture

The per cent of value added by manufacture to the total value of shipments in the soft drink bottling and canning industry was 53 per cent in 1967, as shown in Exhibit V-2. Most of the industries listed in this exhibit have a similar percentage of value added by manufacture, which indicates that the contribution of the production process to product value in the soft drink bottling and canning industry is representative of the majority of industries in the food and kindred products group.

## Capital expenditures

The level of capital expenditures made in an industry is an indirect measure of the vitality of that industry because entrepreneurs with alternative uses for capital would not invest in a declining industry or one that had a less than promising future. Exhibit V-3 shows annual capital expenditures between 1965 and 1969, their total and the average annual level of these expenditures for the soft drink bottling and canning industry and other selected industries in the food and kindred products group. With the exception of the malt liquor industry, the soft drink bottling and canning industry had the highest total and average annual level of capital expenditures. Approximately 8.5 per cent of the total capital expenditures in the food and kindred products group between 1965 and 1969 was made in the soft drink bottling and canning industry. The high level of capital expenditures in the soft drink bottling and canning industry relative to other industries indicates that the industry is modernizing and expanding.

# Distribution of sales

As indicated in the previous chapter, the percentage of product sales in the 56 largest companies in the soft drink bottling and canning industry was 38 per cent in 1967. Exhibit V-4 presents a comparison between the percentage of sales ratios in the soft drink bottling and canning industry and other selected industries. Fluid milk and related products is the only industry with a percentage of sales ratio (49 per cent) that is even relatively close to the low ratio in the soft drink bottling and canning industry. All the other industries listed have percentage of sales ratios considerably higher than 50 per cent and the majority are above 75 per cent for the 50 largest companies. The low percentage of sales ratio found in the 50 largest companies in the soft drink bottling and canning industry indicates that the industry's structure is founded upon many companies of varying sizes rather than a few large companies that dominate the market-place. This low percentage of sales ratio is also evidence of the local operating scope of soft drink bottling and canning companies.

EXHIBIT V-3

COMPARISON OF CAPITAL EXPENDITURES: SOFT DRINK BOTTLING AND CANNING INDUSTRY VERSUS OTHER
SELECTED INDUSTRIES, 1965 THROUGH 1969

[In millions of dollars]

ustry	1965	1966				Total, 1965 through	Annual average, 1965 through
		1300	1967	1968	1969	1969	1969
Total food and kindred	1, 475, 5	1, 692. 0	1,730.1	1, 739. 7	1, 896. 7	8, 534. 0	1,706.8
densed and evaporated		13.6	20.8	16.4	13.2	85. 2	17.0
cream and frozen desserts	32.7	26.7	26.6	22.1			27.7 113.8
d milk			101. 9	99.5	111.7	472.4	94. 3
ur and other grain mill			20.2	26 1	31 3	141.6	28. 3
roducts		19. 2	18. 4	12.1	20.9	86.8	17.4
ad, cake, and related		1/19 6	127 9	133.9	167.7	720.1	144.0
products		48. 1	53.0	64.7	60.5	267.5	53. 5 164. 8
It liquors.	115.4	168.8	140.4	193.6	205.7	823.9	164.
nes, brandy, and brandy	11.3	11.8	10.3	14.0	15.8	63. 2	12.
tilled liquor, except brandy	23.4	32.2	27.0				33. ( 145. (
1 0 11 11 11 11 11 11 11 11 11 11 11 11	products densed and evaporated ilk ream and frozen desserts d milk ned fruits and vegetables r and other grain mill oducts sal preparation ad, cake, and related roducts fectionery products t liquors es, brandy, and brandy pirits	products. 1, 475.5 sides and evaporated silk. 21.2 ream and frozen desserts 32.7 d milk. 114.6 ned fruits and vegetables 74.5 r and other grain mill orducts. 21.9 all preparation. 16.2 ald, cake, and related roducts. 41.2 t inquors. 115.4 es, brandy, and brandy pirits 11.3 silled liquor, except brandy. 23.4	products. 1,475.5 1,692.0 desired and evaporated dilk. 21.2 13.6 ream and frozen desserts 32.7 26.7 d milk. 114.6 105.2 read other grain mill coducts. 21.9 36.0 dil. 2 di	products. 1,475.5 1,692.0 1,730.1 lefused and evaporated lik 21.2 13.6 20.8 ream and frozen desserts 32.7 26.7 26.6 di milk 114.6 105.2 120.3 ned fruits and vegetables 74.5 84.5 101.9 r and other grain mill orducts 21.9 36.0 26.3 lad preparation. 16.2 19.2 18.4 add, cake, and related orducts 41.2 48.1 53.0 fectionery products. 41.2 48.1 53.0 rectionery products. 115.4 168.8 140.4 es, brandy, and brandy pirits 11.3 11.8 10.3 pirits 11.4 lidguor, except brandy 23.4 32.2 27.0 lilled lidguor, except brandy 23.4 32.2 27.0	products. 1,475.5 1,692.0 1,730.1 1,739.7 lensed and evaporated lik. 21.2 13.6 20.8 16.4 ream and frozen desserts 32.7 26.7 26.6 22.1 1 milk. 114.6 105.2 120.3 110.4 lend fruits and vegetables 74.5 84.5 101.9 99.5 r and other grain mill orducts 21.9 36.0 26.3 26.1 lond, cake, and related orducts. 16.2 19.2 18.4 12.1 lond, cake, and related orducts. 142.0 148.6 127.9 133.9 lectionery products. 15.4 168.8 140.4 193.6 les, brandy, and brandy pirits 23.4 32.2 27.0 44.0 littled liquor, except brandy. 23.4 32.2 27.0 44.0 littled liquor, except brandy. 23.4 32.2 27.0 44.0 littled liquor, except brandy. 23.4 32.2 27.0 1 1.1 1.1 links 11.1 1.1 links 11.1 links	products	products

Source: U.S. Department of Commerce, census of manufactures 1967; and annual survey of manufacturers 1966 and 1969.

#### EXHIBIT V-4

#### COMPARISON OF THE PERCENTAGE OF SALES; SOFT DRINKS VERSUS OTHER SELECTED PRODUCTS

SIC code	Product class	Percent of sales attributable to 50 largest companies
20	Total food and kindred products.	
2011	Meatpacking plants products	62
2023	Condensed and evaporated milk	73
20231	Dry milk products	73
20232	Canned milk products (consumer type cans)	100
20233	Concentrated milk shipped in bulk	94
20240	lce cream and ices Fluid milk and related products	68
20261	Bulk fluid milk and cream.	49 60
20262	Packaged fluid milk and related products	55
20264	Buttermilk, chocolate drink, and other flavored milk products	62
20334	Canned fruit juices, nectars, and concentrates	86
20335	Canned vegetable juices	
2051	Bread, cake and related products	56
20820	Malt liquors and brewing byproducts	98
20830	Malt and malt byproducts.	100
20840	Wine, brandy, and brandy spirits	91
2085	Distilled, rectified, and blended liquors, except brandy	99
20851	Distilled liquor, except brandy	
20853 20860	Bottled liquor, except brandy	99
20850	Bottled and canned soft drinks	38 85
200/	Flavoring extracts and flavoring syrups	90

Source: U.S. Department of Commerce, Census of Manufactures Special Report 1967.

# VI.—MARKETS AND MARKETING PRACTICES IN THE SOFT DRINK BOTTLING AND CANNING INDUSTRY

This chapter describes the market for soft drinks in the United States, market characteristics by end user and product classification, market coverage and specific marketing practices such as packaging, advertising, pricing and distribution.

#### Market characteristics

In 1971, the soft drink market in the United States was the equivalent of approximately 3.3 billion cases of 24 eight-ounce bottles with a wholesale value of more than \$5 billion. The estimated breakdown of dollar sales by census region in 1971 was:

Region: Sales (n	(illions)
Northeast	\$1, 100
North Central	1,400
South	1,900
West	750

Two other important market characteristics are brand designation and flavor composition. Examination of each of these factors at the national level provides a meaningful description of the characteristics of the total soft drink market in the United States.

#### Brand Designation

The national brands of the 75 franchise companies accounted for between 85 and 90 percent of total soft drink sales in the United States in 1971. The remaining 10 to 15 percent is attributable to private and store-controlled brands distributed locally, regionally or nationally. Store-controlled brands are proprietary products of supermarket chains and, like private brands, are generally packaged in nonreturnable containers.

#### Flavor Composition

Exhibit VI-1 shows the distribution of soft drink sales by flavor composition for 1958, 1963 and 1967, the last available census years. These statistics show a decline, between 1958 and 1967, in the tendency to consumer colaflavored soft drinks. This trend is consistent with the following estimates of consumption for 1971 obtained from Softdrinks:

Perc	ent of total
Flavor:	-0
(10)8	
Lemon-lime	
Root beer	
Orange	3
Grape	3
"Red" drinks	7

#### End markets

The ultimate end user of soft drinks is the consumer who makes a soft drink preference. For the purposes of the bottler, however, his end markets are the outlets through which he distributes his products. The major end markets in the soft drink industry and their estimated shares of soft drink sales in 1971 were:

Percent o	ftotal
End market:	35
Chain supermarkets	20
Grocery and convenience stores	
Restaurants and bars	$\frac{15}{12}$
Service stations	12
Recreational outlets	6
Other 'on-premise' outlets	5
Other retail outlets	9
Sources · Predicasts Inc. and Softdrinks.	

# EXHIBIT VI-1

DISTRIBUTION OF SOFT DRINK SALES, BY FLAVOR COMPOSITION, 1958, 1963, AND 1967

[Dollar amounts in millions]

Flavor	1958		1963		1967	
	Sales	Percent of total	Sales	Percent of total	Sales	Percent of total
Colas Lemon-lime and lemon and lime combinations Orange Root beer and sarsaparilla Ginger ale Grape Other carbonated flavors	\$691. 7 141. 5 74. 0 47. 7 64. 3 25. 3	66. 2 13. 5 7. 1 4. 7 6. 2 2. 4	\$927. 3 196. 9 76. 2 41. 0 68. 6 35. 3 184. 8	60. 6 12. 9 5. 0 2. 7 4. 5 2. 3 12. 1	\$1, 134. 2 205. 4 81. 4 50. 7 70. 6 34. 4 227. 8	62. 9 11. 4 9. 5 2. 8 3. 9 1. 9 12. 6
Total	1, 044. 5	100.0	1, 530. 1	100. 0	1, 804. 5	100. 0

<sup>1</sup> Not available.

Source: U.S. Department of Commerce Census of Manufacturers and Annual Survey of Manufacturers.

In 1971, approximately 55 per cent of total soft drink volume went through chain supermarkets (which are defined as 11 or more affiliated stores) and grocery and convenience stores. Sales to service stations and recreational outlets were generally vending machine sales while sales to restaurants and bars and other "on-premise" outlets (such as drug stores) were principally fountain and pre-mix sales. Other retail outlets include beverage distributors, cash and carry stores and other outlets selling case units at retail.

### Market coverage

In 1971, there were more than 200,000 retail food outlets selling soft drinks in the United States. Chain supermarkets comprise only 12 per cent of this total number and grocery and convenience stores accounted for the remaining 88 per cent. Other retail outlets include drug stores, bars and taverns, recreational outlets, restaurants and delicatessens, beverage distributors and cash and carry

stores. The total number of these other outlets is estimated at from 750,000 to 1 million establishments.

The extensive use of vending machines in recent years has resulted in an even more intensive coverage of the market. For instance, every service station is estimated to have a soft drink vending machine and there were approximately 220,000 service stations in the United States in 1971. Any business can conceivably sell soft drinks in vending machines as an adjunct to its primary activity; in 1970 there more than 1,300,000 vending machines dispensing soft drinks in bottles, cans and cups.

The wide availability of soft drinks is testimony to the intensive market coverage of bottlers. Bottlers are able to attain this high degree of coverage because they conduct their marketing operations on a local basis in well-defined areas. This orientation of bottlers to a local market area allows them to service a variety of accounts and increase the number of accounts at minimum additional conditions.

tional costs.

#### Packaging

Packaging in the soft drink industry appears to be highly dependent upon consumer demands. Although most bottlers deal directly with the retail outlets and not the consumer, the bottler is responsible for determining the package size

and container type that is desire dby the consumer.

In 1971, an estimated 60 per cent of the soft drinks sold by franchised bottlers were packaged in returnable bottles, 23 per cent were packaged in cans, and 17 per cent were packaged in nonreturnable bottles. The use of returnable bottles in the United States tends to vary by region, from over 70 per cent in the North Central region to 25 per cent in the Northeast region. Aggregate, national statistics on soft drink container usage, which include the sales of franchised brand, store-controlled label and private label soft drinks, show a lower percentage of returnable bottle usage and higher rates of utilization for cans and nonreturnable bottles. This situation contrasts with that of franchised bottlers because store-controlled and private label soft drinks are packaged almost exclusively in nonreturnable containers.

The trend over time has been to larger containers, and in the last 10 years the importance of soft drinks packaged in 6- to 8-ounce containers has fallen markedly while use of 12-ounce and greater-than-16-ounce containers has increased significantly. The distribution of 1971 soft drink package sales was

estimated as follows:

Package size:	Percent
	of sales
6 to 8 ounce	11
10 ounce	
12 ounce	31
16 ounce	17
Larger than 16 ounce	14

Source: Softdrinks.

### Advertising

In 1971, the franchise companies allocated \$348 million for advertising expenditures among the various media, with television and radio accounting for the largest share of advertising budgets. Part of this budget, however, is allocated to cooperative advertising programs with bottlers and promotional activities in which bottlers receive reimbursement for a small portion of local advertising expenditures. Generally, bottlers spend the equivalent of 2 to 3 per cent of sales on local advertising and promotion campaigns.

#### Pricing

The pricing of soft drinks is an autonomous, local decision made by the bottlers on the basis of their costs and competition. Prices vary from franchise to franchise, and the price of a particular brand in one market is not necessarily the same as the price of the same brand in another market. Bottlers tend to adjust their prices according to interbrand competition.

#### Distribution

The vast number and variety of retail outlets served by the soft drink bottling and canning industry require that the industry have an efficient distribution system. The method of distribution most commonly employed in the soft drink bottling and canning industry is route delivery, whereby a truck from the bottling plant services all accounts on a given route. This method of distribution enables the bottler to serve relatively profitable and unprofitable accounts at the same time so that the profits gained in one account can be used to offset losses in another. The result of this balancing is that consumers can obtain soft drinks from a variety of locations rather than being limited to purchasing from those outlets which are most profitable to bottlers.

#### VII .- CHARACTERISTICS OF BOTTLERS STUDIED

This chapter presents detailed background information on the sample of bottlers studied to evaluate the probable impact of the proposed FTC order on the future of the soft drink bottling and canning industry. Specifically, it discusses the marketing, production, and financial characteristics of bottlers in four marketing areas: Birmingham, Alabama; Oklahoma City, Oklahoma; Pittsburgh, Pennsylvania; and Seattle, Washington.

As stated in Chapter I, those four soft drink markets and a number of bottlers within each of these markets were selected as a reasonably representative sample of the bottling and canning operations of the industry. The criteria used to select the four market areas were geographic location, population, the number of bottlers present, size of the bottlers' operations, representation of major brands and presence of store-controlled and local brand soft drinks. A market area was considered to be a circle with a radius of approximately 100 miles from a metropolitan city center.

#### Marketing

Information gathered on the soft drink marketing activities of the bottlers studied included data on sales, case volume, packaging, retail customers, methods of delivery, size and frequency of delivery, and pricing.

#### Sales

The bottlers studied have sales volumes ranging from \$300,000 to \$12,700,000 in 1971 as shown in the table below (in thousands of dollars):

Area 1	Area 2	Area 3	Area 4
200	\$8,000	\$12,700	\$4.300
,200	1,600	1,600	3, 500
500	850	1.000	900
400	600	900	500
200	600	800	400
100	450	650	300

Note: The code number for each market area was randomly assigned; thus, the markets do not appear in the sequence in which they were named above.

In addition to case sales, 17 of the bottlers interviewed had both pre- and post-mix sales in 1971; five bottlers made only pre-mix sales and two bottlers had only post-mix sales; the remaining two bottlers had no pre- or post-mix sales.

#### Case volume

Case volumes for the bottlers studied ranged from 200,000 to 4,300,000 cases. The approximate 1971 volumes (in thousands of cases) were:

Area 1	Area 2	Area 3	Area 4
1,000 100 100 100 00 00 00 03	3, 250 600 600 600 300 300	4, 300 600 400 300 200 200	2, 300 2, 000 400 200 200 200
00			

#### Packaging

The breakdown on bottler sales by package type is shown in Exhibit VII-1. With few exceptions, returnable bottles are the principal package type used. The importance of can and nonreturnable glass package items varied. In market area 1, cans were more important than nonreturnable bottles. In the other market areas, several bottlers had a higher proportion of sales in nonreturnable bottles than in cans. In all the areas studied, the nonreturnable glass and metal containers were accounting for an increasing market share.

#### Retail customers

Bottler accounts were divided into five retail customer categories; chain supermarkets, grocery and convenience stores, restaurants and bars, service stations and others. Exhibit VII-2 shows the percentage distribution of sales to these types of accounts for each of the bottlers studied. In each market area, chain supermarkets and grocery and convenience stores accounted for a large percentage of the bottlers' soft drink sales.

EXHIBIT VII-1

DISTRIBUTION OF SOFT DRINK CASE SALES, BY PACKAGE TYPE

[In percent]

Market area and bottler	Returnable bottles	Nonreturn- able bottles	Cans
Market area 1:			
A	70	4	26
B	83	i	16
C	55	13	32
C	69	10	21
F	66	14	20
G	76 72	11 15	13 13
H	80	10	20
farket area 2:	00 _		20
	15	72	13
	66	22	12
^	60	26	14
M	73	11	16
N	63 82	6	31
larket area 3:	82	3	15
0	44	15	41
P	32	39	29
Q	40	33	27
R.	42	34	24
T	64	11	25
arket area 4:	7	67	26
Ü	87	2	11
٧	85	5	10
W	75	17	8
X	58	27	15
7	78	11	- 11
L	79	12	9

#### EXHIBIT VII-2

#### DISTRIBUTION OF SALES, BY TYPE OF CUSTOMER ACCOUNT

#### [In percent]

Market area and bottler	Chain supermarkets	Grocery and convenience stores	Restaurants and bars	Service stations	Others
Market area 1:	25 25 25 15 20 20 35 30	20 20 20 25 35 25 15 20	10 10 55 5 5 10 50 20	45 55 55 15 25 50 20	41 45 55 55 25 20 50
Market area 2:	48 35 25 2 35 40	22 20 55 60 20 20	1 5 6 5 2	20 5 10 10 10 10	9 35 5 22 30 28
Market area 3:  0	35 40 75 65 40 41	30 25 5 15 23 24	20 20 2 10 20 14	3 15 10 10 7	12 15 8 10 21
Market area 4; U V W X Y Z	30 60 70 37 50 55	20 25 10 5 20 30	8 8 2 5	22 7 10 7 15 3	30 8 46 15 9

#### Method of delivery

The leading method of delivery used by the bottlers studied is route selling, in which soft drinks are sold and delivered by a driver/salesman. Of the 26 bottlers, 21 used route selling exclusively. With one exception, all of the remaining five bottlers used route selling for more than 90 per cent of their distribution needs. The one exception, a large urban bottler, made 95 per cent of his sales through advance selling, in which an advance man sells products which will be delivered a day or two later. One bottler used advanced selling for 10 per cent of his sales, and three bottlers used distributors for between 2 and 4 per cent of their sales. None of the bottlers made soft drink deliveries to chain store warehouses.

#### Size and frequency of delivery

The distribution of bottlers' accounts by size of delivery is shown in Exhibit VII-3. The size of delivery indicates the relative degree of effort a bottler must expend to cover the accounts in his market area—a bottler with a high percentage of accounts taking 10 or fewer cases per delivery must expend more effort to reach a given level of sales than a bottler who makes larger deliveries.

Generally, chain supermarket stores purchase in large volumes of 25 or more cases per delivery, but other retail outlets vary considerably in their needs. Most of the bottlers interviewed stated that large grocery and convenience food stores usually purchase between 10 to 25 cases per delivery, and that outlets such as restaurants, bars, service stations, drug stores and taverns are generally low-volume accounts, buying less than 10 cases per stop.

The frequency of delivery also influences the amount of effort a bottler must expend to service his customers satisfactorily. Generally, chain supermarkets, large grocery and convenience stores and vending accounts receive several deliveries a week, while other accounts are serviced less frequently. Exhibit VII—4 shows the frequency of delivery per week for the bottlers studied, by

type of customer account.

# EXHIBIT VII-3 DISTRIBUTION OF ACCOUNTS, BY SIZE OF DELIVERY

[In percent]

	Number of cases per delivery			
Market area and bottler	Less than 5	6 to 10	11 to 25	26 or more
Narket area 1:				
A	(1)	(¹) 50	(1) 20	(1
C	50	20	30	3
D	50	50	50	5
<u>E</u>	55	30	10	
F	35	30	20	1
Н	(1) 10	(¹) 60	(¹) 20	(1
larket area 2:	10	60	20	1
	30	30	10	3
<u></u>	35	50	10	
K	40 35	45	12 20	1
M	55 55	35 10	5	3
N.	25	35	25	j
arket area 3:				
0	55	25	10	]
0	10 10	50 25	35 40	2
R	8	65	12	í
\$	70	10	14	
T	27	23	25	2
arket area 4:	00	15	_	
U	80 79	15 19	5 2	
W	20	60	10	1
X	72	17	6	
Ÿ	70	15	10	
L	17	24	52	

<sup>&</sup>lt;sup>1</sup> Not available.

#### EXHIBIT VII-4

# FREQUENCY OF WEEKLY DELIVERIES BY TYPE OF CUSTOMER ACCOUNT

Market area and bottler	Chain supermarkets	Grocery and convenience stores	Restaurants and bars	Service stations	Others
Market area 1:					
A	2-3	1 2	1	1	. 1
B C	2-3 2-3	1-3	1-2	1-2 1-2	1-5
D	2-3	2	2	2	2
<u>E</u>	2	1	1	1-2	1-5
t	2	1-2	1	1	2
H	2	1-2 -	1	1	1
Market area 2:			-		
	2-3 2	2	1	1-2	1-4
K	3	2	1	2	1
<u>L</u>	23	2	î	1-2	1-4
N	3	1-2	2	2	1-5 1-5
Market area 3:	2	1-2	2	2	1-3
0	1-2	1	1	2	1
P	2	1	1-2	1	1
R	2	1	i	1	1
<u>S</u>	2-3	1-2	i	1	1
Market area 4:	2	1	I	1	1-5
U	3	2-3	1	2	2-3
V	2	2	ĺ	ī	
W	2-3	1-2	1	1-2 1-2	1-5
Ŷ	2-3	2	1	1-2	2
Z	2	2	1	1	ī

EXHIBIT VII-5
WHOLESALE SOFT DRINK PRICE PER CASE BY PACKAGE TYPE:

Market area and bottler	6- to 8-oz. returnable bottle 2	10-oz. returnable bottle <sup>2</sup>	16-oz. returnable bottle <sup>2</sup>	10-oz. nonreturnable bottle	12-oz. cans
Market area 1:  A	\$1. 95 2. 00 1. 80 1. 70 1. 75 1. 70 1. 90	2.00	\$2. 37 2. 37 2. 62 2. 66 2. 52	\$2. 90 2. 75 2. 80 2. 60 2. 60 2. 70 3. 00	\$3. 15 3. 25 3. 10 3. 10 2. 95 3. 15 3. 50 2. 95
Market area 2: 		1.90 - 1.70 1.80 1.80 1.80 1.85	2. 15 2. 20 2. 20 2. 10 2. 20	2. 40 2. 40 2. 40 2. 40 2. 40 2. 40	2.80 2.70 2.70 2.80 2.70 2.70
Market area 3: 0 P 0 R S T	2. 05 2. 00 2. 20	2. 20 - 2. 30 - 2. 40 - 2. 40 - 2. 35 - 2. 30	2, 90 3, 00 3, 00 2, 95 3, 00	2.90 3.00 3.00 3.10 3.15 3.20	3. 10 3. 25 3. 25 3. 40 3. 45 3. 25
Market area 4: U V W X X Y Z	1.70 1.60 1.65 1.85 1.70 1.60	1. 85 1. 85 1. 85 1. 85 1. 85 1. 85	2. 25 2. 35 2. 40 2. 35 2. 40	2. 60 2. 65 2. 70 2. 65 2. 60 2. 65	3. 00 2. 95 3. 10 2. 95 2. 85 3. 00

The differing prices between market areas are attributable mainly to local labor and union conditions; the variance in prices among contiguous bottlers of the same brand is primarily a result of adjustments necessary to meet interbrand competition.

2 Does not include case and bottle deposit.

#### Prices

Wholesale prices charged by bottlers for soft drinks differed among areas and among bottlers in a given area. Exhibit VII-5 lists soft drink wholesale prices by market area and bottler for five different package types. Nonreturnable glass and metal containers are the most expensive packages that bottlers handle. The differing prices between market areas are attributable mainly to local labor and union conditions; the variance in prices among contiguous bottlers of the same brand is primarily a result of adjustments necessary to meet interbrand competition.

#### Production

The production activities of the bottlers studied were generally similar in scope. Twenty-two of the 26 bottlers operated one plant with one bottling line. Two bottlers had two bottling lines in the same plant, and one bottler had two plants with one bottling line in each. One bottler operated a canning line in addition to his bottling activities, Eight bottlers had one or more satellite ware-houses to facilitate distribution.

The production capacity of the bottlers studied ranges from 60 to 1.000 10-to 12-ounce bottles per minute. The median production capacity for all bottlers for this package type is 200 bottles per minute. Average plant utilization for an eight-hour shift for each of the market areas is as follows:

### Average plant utilization, per shift

Market area:	Percent	Market area—Continued	Percent
1	83		
2	76	4	80

In peak summer seasons, average plant utilization for each of the bottlers is appreciably higher.

#### Profitability

Twenty-four of the 26 bottlers studied provided financial information on their operations in 1971. In examining these financial data, a bottler's soft drink operations were segregated from non-soft drink activities such as vending of other products, interest payments and rent from coolers. The 1971 soft drink operating pretax profits as a per cent of soft drink sales for these 24 bottlers are presented in Exhibit VII–6. The median pretax profit on soft drink sales was 6 per cent and ranged from —1 to 14 per cent of sales. Eighteen of the 24 bottlers also had income from non-soft drink activities; however, for most of them, this other income represented a relatively minor per cent of soft drink sales.

EXHIBIT VII-6

BOTTLER SOFT DRINK PRETAX PROFIT OR (LOSS) AS PERCENT OF SOFT DRINK SALES

Market area and bottler	Soft drink profitability	Market area and bottler	Soft drint profitability
Market area 1: A	3 8	Market area 3:	13
C	5 5 8	Q R_ S_	10
F G H Market area 2:	14 4 6	TMarket area 4:	
	6 (1)	W	
M	11′	Z Median	

<sup>1</sup> Not available.

# VIII,—IMPACT OF THE PROPOSED FTC ORDER ON BOTTLER MARKETING AND PRODUCTION OPERATIONS

This chapter discusses the probable impact of the FTC complaint on the marketing and production operations of the soft drink bottlers studied in each of the four market areas. It describes the events that would most probably occur as a result of the FTC's action and projects the effect of these events on bottler sales, packaging, customer service, pricing and production. The ultimate effect these events would have on consumers' freedom of choice in selecting soft drink products is also discussed.

#### Market impact of the FTC order

The sequence of events most likely to result from the FTC action was synthesized through discussions with soft drink bottlers located across the country and with various representatives of franchise companies and trade associations; through an extensive review of the history and present situation of the soft drink bottling and canning industry; and through the consultants' comprehensive knowledge of the food industry. These events should be viewed along a continuum in which a gradual movement from one event to another takes place over time.

In the short term, if compliance with the FTC action is required, most bottlers would lose their sales to chain supermarket stores located within their areas, and these loses would occur almost immediately. Chain supermarkets would begin to supply their stores with soft drinks from their own centrally located warehouses, and only the largest bottlers, who have appropriate transportation equipment and production capabilities and who are located in larger cities where most chain store warehouses are also situated, would be in a position to serve these chain store accounts. For smaller bottlers, these events would be followed by the gradual loss of sales to grocery and convenience stores as food brokers begin to supply the soft drink needs of these retailers. At present, several food brokers in various parts of the country supply their grocery and convenience outlets with regional brands of soft drinks. With the demise of territorial restrictions, food brokers would soon be in a position to supply national brands of soft drinks to

their customers. However, bottlers would not lose all their sales to grocery and convenience stores immediately because it would be uneconomical for a food broker to service certain of the "mom and pop" stores and they would be left to the local bottler. Loss of sales to a high proportion of these retail food outlets would probably occur by the end of the decade, if the proposed FTC order prevails. During this latter period, we believe food brokers would be able to gear their operations to the needs of even the smaller, isolated food stores, and would be able to provide food retailers with most of their soft drink requirements, possibly at higher prices reflecting the food broker's commission.

If the bottler loses his high volume retail food accounts, it appears unlikely that a competing bottler, who sells the same brand of soft drink products and who is as much as 50 to 100 miles away, would attempt to take from the local bottler some portion of his remaining low-volume accounts. To send a delivery truck into the local bottler's territory and to attempt to generate sales from smaller retail accounts which are loyal to the local bottler would not be economical. Most bottlers interviewed felt that they would not generate enough sales from such relatively smaller outlets to cover their operating costs. Therefore, intrabrand competition among bottlers for small accounts, such as "mom and pop" stores, gas stations, bars, etc., is not regarded as a significant factor, and is not considered in the remainder of this report.

In the analysis that follows, it is assumed that most bottlers will experience the same probable consequences of the FTC action. Undoubtedly, one or two bottlers could service the chain supermarket and food broker warehouses in each area. However, because one-way containers may be shipped long distances, the bottler who services large accounts within each market area may be located at a considerable distance from that market. The following analysis describes what is likely to happen to the vast majority of bottlers who fail to capture such large accounts.

#### Bottler soft drink sales

Sales to chain supermarket stores are a significant percentage of bottlers' soft drink sales, as shown in the following table:

	Percent of sales to chai supermarket stores	
Market area	Range	Average
	15-35 2-48	2
	35–75	4

With the loss of chain supermarket accounts, the expected near-term average loss of 24 to 50 per cent of a bottler's soft drink sales would greatly and immediately affect his operations. In the long term, more and more of the grocery and convenience store outlets would be lost to food brokers. By the end of the decade, bottlers' losses could average 46 to 69 per cent of their total 1971 soft drink sales volume. Bottler sales to all 1\*\*pes of retail food outlets are shown below:

	Percent of sales in ret food outlets	
Market area	Range Av	erag
	40 -50 55-80	6
	65-80	

The impact of the FTC complaint probably would also affect bottlers' vending, post-mix and pre-mix sales. These products are sold to such outlets as restaurants, bars, service stations, drug stores, schools and industrial accounts. Such sales would still require servicing by a local bottler; however, they offer little economic opportunity to compensate for the expected supermarket and retail food store losses.

#### Soft drink packaging

The impact of a successful FTC order on soft drink packaging will be to stimulate a rapid movement toward the use of noureturnable containers, the most expensive form of package for the consumer. The impact on packaging will not be as immediate as the expected change in bottlers' sales because of the present extensive use of returnable containers in the markets studied. Nevertheless, supermarket chains and food brokers would quickly move to the exclusive use of one-way containers because, by contrast, the high cost of handling, storing and transporting returnable bottles makes their use impractical in warehouse delivery systems.

If the FTC is successful, the use of one-way containers would also be accelerated by bottlers who might attempt to distribute in another bottler's territory. A bottler recoups his investment in returnable glass containers only after the bottle has been refilled several times. If the FTC prevails, the bottler would have increasing difficulty in refilling bottles enough times to recover his investment, because glass containers shipped to other areas would probably not be returned to the original bottler's territory. As a consequence, bottlers would be forced to invest more and more in one-way containers.

The following table shows the average sale by package type for the bottlers studied:

#### [In percent]

	Sales by package type	
Market area		Nonreturnable
	71 60 38 77	2 4 6 2

The present situation, which is characterized by the predominant use of returnable containers in many areas, would probably be reversed during the remainder of the decade if the FTC order prevails. Thus, warehouse deliveries to chain supermarkets and food brokers and decreased bottler investment in returnable containers would have a direct effect on soft drink packaging and would intensify the ecological problems associated with the use of one-way containers. In addition, such a situation would place upward pressure on soft drink prices since non-returnable containers create higher costs for consumers.

#### Customer service

During the field visits, the bottlers interviewed expressed differing viewpoints with respect to their distribution and selling responsibilities and activities. Most franchise agreements require that a bottler service all retail outlets in his area regardless of whether the outlet is profitable. Some bottlers also felt it was a good competitive practice to service all remaining outlets in a given area, even if they lost several key accounts. They felt that to do otherwise would gradually erode their products' sales in their total territory since competitors' products would have greater exposure and availability.

By contrast, if the FTC order is upheld, several bottlers indicated that they would adjust their selling and distribution practices to reflect changes in sales volume. These bottlers felt that they would no longer be able to balance a selling route with large and small accounts so that the relatively higher profitability of the former compensated for the relatively lower profitability of the latter. They stated that the loss of sales to supermarket chain stores would force them either to drop some of their less profitable accounts or to raise prices in order to continue serving them as before. In any case, the customer service provided by these bottlers would decline. If the FTC complaint is upheld, many of their smaller accounts would be served less frequently, and the wide availability of soft drinks would decrease in their areas.

#### Soft drink pricing

It is highly questionable whether the overall level of soft drink prices would be lower as a result of a successful FTC action. The increased use of one-way containers, both by chain supermarkets and by bottlers, would place upward pressure on soft drink prices. A case of 10-ounce nonreturnable bottles at wholesale is generally 28 to 39 per cent higher in cost than a case of 10-ounce returnable bottles, as shown below:

	Wholesale co		
Market area	10 oz. nonreturnable	10 oz. returnable <sup>1</sup>	Percent difference
1 2 3 4	\$2, 40 3, 00 2, 65	\$1. 80 2. 35 1. 90	(²) 33 28 39

<sup>1</sup> Does not include case and bottle deposit.

Further upward pressure would be exerted on soft drink prices by price increases some bottlers would be required to make to their low-volume accounts, if they were to lose a considerable number of high-volume food store accounts as a result of the FTC order. In addition, as the industry approaches an oligopolistic structure as a result of the probable elimination of many of today's bottlers, soft drink prices can be expected to increase because of lessening competition. These upward price pressures may be partially offset if chain supermarkets and food brokers request volume purchase discounts when receiving warehouse deliveries, but, a decision to pass on such potential savings to consumers would be left to the discretion of the supermarket chains and brokers; however, it may be anticipated that most chain supermarkets would seek to preserve traditional price differentials between national brands on the one hand and store-controlled and private label brands on the other, particularly since many of these accounts offer competing store-controlled brands.

#### Soft drink production

If the FTC order is upheld, its impact on the production operations of most bottlers would be severe. The probable loss of sales to chain supermarkets would sharply reduce a bottler's plant utilization and cause fewer, smaller and less frequent production runs. This poor utilization of production equipment would result in reduced efficiency and higher operating costs and would ultimately place upward pressure on the price of soft drink products to the bottler's remaining low-volume accounts.

#### Consumer freedom of choice

If the FTC order is upheld, large chain supermarkets and food brokers would control the retail food store marketplace. By the end of the decade most of the soft drink products in each bottler's area would go through the central warehouses of these large accounts. The substantial shares of soft drink sales held by these accounts would give them the potential for restricting the representation of the various soft drink brands within their market areas. Since bottlers would no longer merchandise their products within the chain supermarket stores, these large accounts, by assuming complete control of shelf space allocations within their stores, would intensify their present practice of granting preferential treatment to store-controlled and private labels and decrease the local representation of other brands. Food brokers could also restrict a franchise company's representation within a market since their current practices indicate that they are unlikely to carry more than a few different brands of soft drink products. These actions, by both chain supermarkets and food brokers, would ultimately diminish a consumer's freedom in selecting and buying the soft drink brand of his choice.

#### IX.-IMPACT OF THE PROPOSED FTC ORDER ON BOTTLER FINANCIAL PERFORMANCE

This chapter discusses the probable impact of the proposed FTC order on soft drink bottler financial performance. It describes a computerized financial model developed by the consultants to assist in the analysis of bottler operating costs, indicates the three market assumptions under which the model was operated and discusses the methods used for allocating individual bottler costs under each market event. The expected bottler financial performance under each of the

<sup>&</sup>lt;sup>2</sup> Not available.

various market and cost conditions is then described, and the impact these events may have on bottler financial investment is projected.

#### Bottler financial model

The basic tool used to examine the likely effect on soft drink bottler financial performance resulting from the proposed FTC order was a computerized financial model. The financial model was developed to determine the minimum sales volume at which a bottler could function as a profitable economic unit and provide a useful service to consumers. The financial model was concerned primarily with a detailed breakdown of each bottler's profit and loss statement into fixed and variable expense categories, with special attention to cost centers relating to bottler production, selling, advertising, motor vehicle, warehousing and administrative expenses. Each bottler's sales information by type of customer was also stored in the model. The customer classifications used were chain supermarkets, grocery and convenience stores, restaurants and bars, service stations, and a general category called other; the percentage of each bottler's total sales accounted for by these various customer groups was recorded in the model. The model was then designed to calculate the profit and loss of the bottler according to any set of market conditions specified. As the various probable market effects of the FTC order were examined, the financial model revealed whether the bottler would operate at a profit or loss with respect to each alternative. (The assumptions made to facilitate the construction of the financial model are discussed in Appendix A.)

#### Future market events

As stated in the previous chapter, the most probable effect of the FTC action would be the immediate loss by most bottlers of their chain supermarket accounts because these stores would demand and receive warehouse delivery of soft drinks. Most bottlers would also gradually lose their grocery and convenience outlets. These stores would begin to be serviced more and more by food brokers who would fill some of the soft drink needs of these outlets along with their other food requirements.

Based on this probable result of a successful FTC order, three market "events" were built into the financial model.

Under Event A, each bottler's profit and loss statement was analyzed to determine the financial impact of the loss of all his chain supermarket accounts.

Under *Event B*, each bottler's profit and loss statement was analyzed to determine the financial impact of the loss of all his chain supermarket and one-half of his grocery and convenience store accounts.

Under Event C, each bottler's profit and loss statement was analyzed to determine the financial impact of the loss of all his chain supermarket, grocery and convenience store accounts.

#### Methods for allocating costs

Because of the divergent viewpoints expressed by the bottlers studied with regard to their selling and distribution activities, each of the above events was analyzed under three cost conditions. As previously noted, some bottlers felt that to be competitive required servicing each retail outlet in all areas of their territory, regardless of whether the outlet was profitable. These bottlers viewed their major selling and delivery expenses as essentially fixed costs. On the other hand, some bottlers indicated that if the FTC were successful, they would adjust their selling and distribution costs to reflect changes in sales volume, essentially viewing these costs as variable expenses. To accommodate these contrasting viewpoints, three different methods for allocating costs to fixed and variable categories under each of the above events were incorporated into the model. In all three methods, production, advertising, warehousing, and administrative costs were first classified into fixed and variable categories. Following this, selling and motor vehicle expenses were allocated in the following manner:

In Allocation I (High fixed costs), most selling and delivery expenses were classified as fixed costs unless clearly related to sales volume changes.

In Allocation II (Medium variable costs), selling and delivery expenses were classified in the same manner as in the first allocation except that selling and

motor vehicle fixed expenses were reduced 50 per cent and allocated to variable costs.

In Allocation III (High variable costs), selling and delivery expenses were classified in the same manner as in the first allocation except that all selling and motor vehicle fixed expenses were allocated to variable costs.

#### Bottler financial performance

The financial model developed nine different profit and loss statements for each bottler. This resulted from combining the three different methods for allocating costs between fixed and variable categories with the three different market events. The results obtained from the model's operation under these nine cases are dis-

cussed in the following paragraphs.

Projected bottler profitability .-- Exhibits IX-1, IX-2 and IX-3 indicate the financial impact of Events A, B, and C would have on individual bottler finances. Under Event A (loss of chain supermarket sales) and Cost Allocation I (high fixed costs), 22 out of 24 bottlers (92 per cent) would show a projected pretax loss from their soft drink operations. Bottler losses decrease somewhat under Event A (loss of chain supermarket sales) and Cost Allocations II (medium variable costs) and III (high variable costs). However, even in the bottlers' most favorable case, Event A (loss of chain supermarket sales) and Cost Allocation III (high variable costs), 18 of the 24 bottlers (75 per cent) studied would probably not be able to operate their soft drink operations profitably. Under Event B (loss of chain supermarket and one-half of grocery and convenience store sales) and Event C (loss of all chain supermarket, grocery and convenience store sales), the projected soft drink bottler profitability rate becomes even worse. In Event B, and Cost Allocations I (high fixed costs), II (medium variable costs) and III (high variable costs) 92, 92, and 100 per cent of the bottlers studied would suffer losses from their soft drink operations. In Event C and under all three cost allocations, no bottler is projected to have a pretax profit from his soft drink activities. The percentage of bottlers who would show pretax losses on soft drink operations under the three events and cost allocations are summarized below:

EXHIBIT IX-1

PROJECTED PRETAX PROFIT OR (LOSS) AS A PERCENT OF SOFT DRINK SALES UNDER EVENT A—LOSS OF CHAIN
SUPERMARKET SALES
.

	Pretax profit o	fit or (loss) under cost allocation	
Bottler	I High fixed costs	II - Medium variable costs	III—High variable costs
	11	11	11
The state of the s	6	7	8
	0	í	1
	0	1	î
	0	U	1
	(2)	U	3
	(3)	(2)	.0
	(5)	(3)	(1
	(5)	(2)	1
	(6)	(5)	(4
	(7)	(6)	(4
		(7)	(4
	(9)		(7
	(12)	(9)	(/
	(12)	(/)	(2
	(15)	(13)	(11
	(16)	(14)	(13
	(15)	(11)	(5
	(16)	(14)	(11
		(15)	`(9
	(20)		(9
	(22)	(15)	
	(25)	(21)	(16
	(36)	(33)	(30
	(66)	(56)	(46
N	(73)	(57)	(40
<b> </b>	(87)	(64)	(41
)	(01)	(01)	

#### EXHIBIT IX-2

PROJECTED PRETAX PROFIT OR (LOSS) AS A PERCENT OF SOFT DRINK SALES UNDER EVENT B -LOSS OF CHAIN SUPERMARKET AND ONE-HALF OF GROCERY AND CONVENIENCE STORE SALES

	Pretax profit or	(loss) under cos	t allocation
Bottler	I—High fixed costs	II Medium variable costs	III—High variable costs
F	(1) (1) (5) (11) (12) (12) (13) (13) (15) (17) (17) (21) (22) (23) (23) (23) (31) (36) (37) (53)	(1) (4) (9) (11) (7) (12) (10) (12) (10) (13) (15) (18) (15) (21) (22) (22) (27) (45) (62)	3 3 (3) (6) (10) (2) (10) (6) (10) (6) (9) (13) (14) (7) (19) (17) (19) (18) (18) (18) (37)

EXHIBIT IX-3

PROJECTED PRETAX PROFIT OR (LOSS) AS A PERCENT OF SOFT DRINK SALES UNDER EVENT C—LOSS OF CHAIN SUPERMARKET, GROCERY AND CONVENIENCE STORE SALES

	Pretax profit o	r (loss) under cos	t allocation
Bottler	I—High fixed costs	II—Medium variable costs	III—Higi variabl cost
	(12)	(0)	
		(8)	(4)
*******	(13)	(11)	(10)
	(19)	(17)	(15)
***************************************	(23)	(21)	(19
	(23)	(19)	(15
	(24)	(19)	(13
	(25)	(17)	(8
	(26)	(22)	(19
	(27)	(21)	
			(15
	(30)	(23)	(16
	(33)	(31)	(28
	(33)	(28)	(24
	(34)	(32)	(29
	(35)	(29)	(23
	(38)	(30)	(22
	(39)	(27)	(16)
*****	(55)	(41)	
	(62)		(27)
		(47)	(32)
	(63)	(48)	(33)
	(118)	(101)	(83)
	(119)	(88)	(57)
	(138)	(119)	(99)
	(151)	(101)	(130)
	(160)	(125)	(89)

#### [in percent]

		Event	
Cost allocation	A	В	С
	92 87 75	100 92 92	100 100 100

The severe effects of Events A. B. and C on bottler soft drink profitability are somewhat lessened by bottler income from non-soft drink activities. Although the bottler pretax profitability rate would increase in most cases, due to the addition of other operating income, the effects of each of the three events still would significantly reduce bottler pretax profitability. The percentages of bottlers expected to suffer pretax losses on all operations under the three events and cost allocations are as follows:

#### [In percent]

	Event		
Cost allocation	A	В	С
	75 71 59	96 92 87	100 100 100

A detailed breakdown of individual bottler soft drink profitability as a per cent of sales under each event and cost allocation is given in Appendix B.

Price increase to restore bottler profitability.—Because of the projected decline in bottler pretax profits resulting from Events A, B, and C, an attempt was made to determine how much each bottler would need to raise his selling prices if he were to return to his 1971 level of profitability expressed as a per cent of soft drink sales. The price increases required were calculated on the remaining retail outlets serviced by the bottler under each event, and the results are summarized in Exhibit IX-4. Under Event A (loss of chain supermarket sales), the median price increases would be 18, 13, and 12 per cent for Cost Allocations I (high fixed costs), II (median variable costs), and III (high variable costs), respectively. For Events B (loss of chain supermarket and one-half grocery and convenience store sales) and C (loss of all supermarket, grocery and convenience store sales), the median price increases are correspondingly higher, reaching 41 per cent in Event C. Cost Allocation I. In each case, the median price increase is substantial, and it appears that increases of this magnitude would not easily be accepted by the bottler's remaining customers.

SOFT DRINK PRICE INCREASES TO NONFOOD OUTLETS REQUIRED TO REGAIN 1971 PRETAX PROFITABILITY

#### [In percent]

		In	crease under co			
-	- · ·				111	
Event	Range	Median	Range	Median	Range	Median
Event A	0-97 12-111 22-1 <b>6</b> 2	18 25 41	0 -74 10-85 20-146	13 21 34	0 -53 8 -68 15-1 <b>05</b>	12 18 28

The exhibit also shows the wide range of price increases that would be needed to return bottlers to 1971 pretax soft drink profitability levels. It is unlikely that bottlers who fall at the top half of these ranges could pass on such high price increases to their remaining customers. A detailed breakdown of individual bottler price increases required to return to 1971 pretax profit levels is provided in Appendix C.

# Bottler financial investment

If the FTC action is successful, the value of most bottlers' investments (both tangible and intangible) in their soft drink operations would be sharply reduced. Any change in a bottler's profitability is reflected quickly in the value investors and potential buyers place on his business. If, as projected, most bottlers' soft drink activities become unprofitable or their profitability is substantially lowered by the FTC order, then bottlers' financial investments in their operations also would be expected to sharply decline. Additionally, the projected decline in the profitability of many bottling operations could be expected to reduce the propensity of external sources of capital and bottlers for making new investments or reinvestments of profits in the soft drink bottling and canning industry.

X.—IMPACT OF THE PROPOSED FTC ORDER ON THE STRUCTURE OF THE SOFT DRINK BOTTLING AND CANNING INDUSTRY

A successful FTC complaint would result in rapid and substantial changes in bottler operations in the four market areas studied. A few large bottlers, who are strategically located in the larger cities and who possess the financial, production and transportation resources needed to service chain supermarkets, would enjoy rapid growth in sales. By contrast, most of the remaining bottlers would either be forced out of business or would have to significantly alter their present soft drink operations if they are to survive.

Most bottlers are projected to suffer significant losses in soft drink sales and for many the losses would be great enough to force them out of business. As a consequence of the sales losses, the utilization of these bottlers' production facilities would be sharply reduced. Furthermore, it appears unlikely that their remaining low-volume accounts could be profitably serviced. In such a situation, since neither their bottling nor their distribution activities would be profitable, many of the bottlers probably would not be able to sell or merge their soft drink operations. Thus, they would be forced out of business, and would lose their entire

financial investment, if the FTC order prevails.

The surviving bottlers, other than those in rural marketing areas, would be faced with an extremely harsh competitive environment. After the probable loss of their chain supermarket accounts, they could expect a large urban bottler to enter their territory in order to capture some portion of their remaining accounts. To do this, the large bottler would have to invest in and develop additional distribution capabilities. The large bottler could purchase these resources himself, or he could acquire the existing distribution operations of the smaller local bottlers and thereby eliminate most of the competition he would face in entering the new market. Because of their poor projected financial and competitive position, the smaller bottlers, who might attempt to sell to or merge their businesses with a large bottler, would be negotiating from a weak bargaining position and could only sell their operations at a distressed price. Such small bottlers, who do sell to or merge their operations with a large urban bottler, would probably have their production facilities closed and their businesses turned into satellite warehouse and distribution points.

Alternatively, when faced with the same threat of market invasion by a large bottler, some of the remaining smaller bottlers could attempt to consolidate their operations by merging with one another until they formed an economic unit able to compete effectively with the production, marketing, financial, and distribution capabilities of the larger bottlers. In such a case, because of the expected decrease in the sales available to the merged unit, the overall value of each bottler's investment in the combined operation would be sharply lowered. The merging bottlers would probably consolidate their production facilities in one location; the nonproducing plants would then concentrate solely on marketing and distribution to the remaining outlets within their areas, and would eventually develop into satellite warehouse and distribution points for the

producing plants.

Another possible alternative is for some of these remaining bottlers to attempt to become soft drink distributors; these bottlers would close their production facilities, and only market and distribute franchised soft drink products purchased from large soft drink bottlers and canners. In this situation, the large bottlers and canners would view these soft drink distributors essentially as warehouse distribution points and serve them in the same fashion as the central warehouses of their chain supermarket and food broker accounts. In serving such soft drink distributors, the larger bottlers would be relieved of the organization, management and financial burdens associated with operating a large number of satellite warehouse facilities. In such a case, the large bottlers would have all the benefits of selling their products in an expanded marketing area while leaving the tedious and costly task of store delivery to small accounts to the former local bottlers. If the bottlers who become distributors survive, they would lose the substantial financial investment they have made in their production facilities.

In summary, if the FTC order is upheld, the entire structure of today's soft drink bottling and canning industry would be substantially altered with severe economic penalties for most of today's bottlers. Since the four market areas studied generally characterized most of the soft drink markets across the country, similar results could be expected to occur in the remaining soft drink markets in the United States. Eventually, a few large bottlers would dominate the production of soft drink products; they would distribute their soft drink products from their own distribution points or sell them to soft drink distributors. Some of these large producers would also service the chain supermarket and food broker warehouses located in their areas. Most of today's soft drink bottlers would be eliminated; if they are not forced out of business entirely, they would become either satellite warehouse distribution points or soft drink distributors operating at greatly reduced revenues and profits. As a consequence of these events, local employment opportunities would be reduced as soft drink production employees and others are displaced. In addition, these bottlers' important contributions to their local communities in the form of property and other local taxes, and their numerous community services, would be adversely affected.

APPENDIX A.—BOTTLER FINANCIAL MODEL ASSUMPTIONS

Two assumptions were made concerning bottler financial and marketing practices to simplify the construction of the financial model, and to take into account the wide range of variations in changes in bottlers sales and operating conditions that would result from a successful FTC order. These assumptions were that:

The elements in bottlers' variable cost mix (production, selling, motor vehicle, warehousing, and administrative) would constitute roughly the same propor-

tion of sales as they did before the market change.

Chain supermarkets and food brokers would tend to deal only with nonreturnable bottle and canned soft drinks, thereby eliminating the need and expenses associated with recycling returnable bottles through their own warehouses.

Neither of these assumptions should appreciably affect the results obtained from using the model and would not alter any conclusion of this report.

# APPENDIX B.—BOTTLER FINANCIAL PERFORMANCE APPENDIX B

# ACTUAL 1971 FINANCIAL PERFORMANCE UNDER COST ALLOCATION I: HIGH FIXED COSTS

[Percent of soft drink sales]

Market area and bottler	Fixed costs	Variable costs	Soft drink operating profit of (loss)
larket area 1:	36	61	3
A	39	53	8
B	35	60	8 5
C	41	54	5
D	34	58	8
F. Control of the con		56	14
	31		4
	36	60	6
G	41	54	b
H			
Narket area 2:	20	74	6
The second secon	28	73	(1
		(1)	(1)
K	(¹) 25	64	ìi
	23		(1)
M. Carrier and Car	(¹) 22	(1)	(1)
M	22	70	/
Name of the second seco			
Market area 3:	28	60	13
0	36	60	4
P	32	58	10
0	40	58	
R		54	Č
	37		2 9 7
2	17	76	/
Market area 4:	22	69	<u> </u>
V	28	66	(
V	31	62	7
W	30	67	3
X		62	Š
V	30		3
1	25	68	

### PROJECTED FINANCIAL PERFORMANCE UNDER EVENT A: LOSS OF CHAIN SUPERMARKET SALES -COST ALLOCATION I: HIGH FIXED COSTS

Market area and bottler	Fixed costs	Variable costs	Soft drink operating profit or (loss)
Narket area 1:			
A	48 52 47 49	61 53 60	(9) (5) (6) (3)
E	43 39 56	54 58 56 60	(16) (12)
H flarket area 2:	58	54	
J	38 43 (¹) 26 (¹) 37	74 73 (¹) 64 (¹)	(12) (16) (1) 11 (1) (7)
larket area 3: 0	43 60 128 115	60 60 58 58	(2) (20) (87) (73)
S T T Tarket area 4:	62 29	54 76	(16) (5)
V. X. Y. Z	31 69 104 48 60 57	69 66 62 67 62 68	0 (36) (66) (15) (22) (25)

PROJECTED FINANCIAL PERFORMANCE UNDER EVENT B: LOSS OF CHAIN SUPERMARKET AND 12 OF GROCERY AND CONVENIENCE STORE SALES—COST ALLOCATION: HIGH FIXED COSTS

arket area 1: A	E.E.	0.1	
	55	61	(17
B	60	53	(13
<u> </u>	54	60	(13
D	57	54	(11
E	55	58	(12
F	46	56	(12
G	63		( )
i i i i i i i i i i i i i i i i i i i		60	(23
arket area 2;	68	54	(2)
	48	74	(2)
J	50	73	(23
K	(1)	(1)	( -
	37	64	
M			(
NI	(1)	(1)	. (
arket area 3:	44	70	(15
0	55	60	(19
P	75	60	(3)
Q	143	58	(10)
R	147	58	(105
S	77	54	
T			(3)
orket area 4:	36	76	(12
V	36	69	( !
V	101	66	(67
W	125	62	(87
Χ	50	67	(17
Α	75	62	
• • • • • • • • • • • • • • • • • • • •			(37
	85	68	(53

PROJECTED FINANCIAL PERFORMANCE UNDER EVENT C: LOSS OF CHAIN SUPERMARKET, GROCERY AND CONVEN-IENCE STORE SALES—COST ALLOCATION I: HIGH FIXED COSTS

Market area and bottler	Fixed costs	Variable costs	Soft drink operating profit or (loss)
Market area 1:  A	65	61	(27)
	71	53	(24)
	64	60	(23)
	69	54	(23)
	75	58	(33)
	56	56	(12)
	73	60	(33)
	81	54	(35)
H	65	74	(39)
	61	73	(34)
	(¹)	(¹)	(1)
	66	64	(30)
	(¹)	(¹)	(1)
	55	70	(26)
Market area 3:  O P Q R S T	79	60	(38)
	102	60	(63)
	160	58	(119)
	202	58	(160)
	101	54	(55)
	49	76	(25)
Market area 4: U. V. W. X. Y.	44	69	(13)
	184	66	(151)
	157	62	(118)
	52	67	(19)
	100	62	(62)
	170	68	(138)
ACTUAL 1971 FINANCIAL PERFORMANCE UNDER COST ALLOCAT	TON II: MEDI	68	
A B C C C C C C C C C C C C C C C C C C	32 32 35 32 26 32 35	60 62 60 60 61 64 59	3 8 5 5 8 14 4 6
Market area 2:	14	79	6
	25	75	(1)
	(¹)	(¹)	(1)
	21	68	11
	(¹)	(¹)	(1)
	20	73	7
Market area 3: 0	23	64	13
	28	68	4
	24	66	10
	32	67	2
	29	62	9
S	13	80	7

PROJECTED FINANCIAL PERFORMANCE UNDER EVENT A: LOSS OF CHAIN SUPERMARKET SALES—COST ALLOCATION II: MEDIUM VARIABLE COSTS

Market area and bottler	Fixed costs	Variable costs	Soft drink operating profit or (loss)
Market area 1:			
A	39	63	(7)
	43	60	(3)
	43	62	(5)
	42	60	(2)
	40	60	0
	32	61	7
	49	64	(14)
	50	59	(9)
J	28	79	(7)
	39	75	(14)
	(1)	(1)	(1)
	21	68	11
	(1)	(1)	(1)
	33	73	(6)
Aarket area 4:	36	64	0
	46	68	(15)
	98	66	(64)
	90	67	(57)
	49	62	(11)
	21	80	(2)
V	29	70	1
	64	68	(33)
	90	66	(56)
	43	70	(13)
	47	63	(15)
	49	72	(21)

PROJECTED FINANCIAL PERFORMANCE UNDER EVENT B: LOSS OF CHAIN SUPERMARKET AND  $\frac{1}{2}$  -OF GROCERY AND CONVENIENCE STORE SALES COST ALLOCATION II: MEDIUM VARIABLE COSTS

Market area 1:			
· ·			
A	44	68	(13
В	50	60	(10
C	49	62	(12
D	49	60	
F			(9
F	51	60	(1)
	38	61	1
0	56	64	(20
Н	58	59	(18
Parket area 2:	00	55	(10
	35	79	(15
J	56	75	(2)
K	(1)		
		(1)	(
M	31	68	]
N	(1)	(1)	(
	40	73	(12
arket area 3:			(
0	47	64	(10
	59	68	
Q	109		(27
		66	(75
0	115	67	(82
T	60	62	(22
	27	80	(7
arket area 4:		00	( )
U	34	70	
V	94		(4
		68	(62
Υ	108	66	(74
V	45	70	(15
7	59	68	(27
	73	72	(45
	, 5	, _	(43

# PROJECTED FINANCIAL PERFORMANCE UNDER EVENT C: LOSS OF CHAIN SUPERMARKET, GROCERY AND CONVENIENCE STORE SALES—COST ALLOCATION II: MEDIUM VARIABLE COSTS

Market area and bottler	Fixed costs	Variable costs	Soft drink operating profit or (loss)
Market area 1:  A	53	63	(21)
	59	60	(19)
	58	62	(21)
	59	60	(19)
	71	60	(31)
	47	61	(8)
	64	64	(28)
	70	59	(29)
Market area 2:	48	79	(27)
	56	75	(32)
	(¹)	(¹)	(1)
	55	68	(23)
	(¹)	(¹)	(1)
	50	73	(22)
Market area 3:	67	64	(30)
	80	68	(48)
	122	66	(88)
	158	67	(125)
	79	62	(41)
	36	80	(17)
Market area 4:  U	41	70	(11)
	172	68	(140)
	135	66	(101)
	47	70	(17)
	79	68	(47)
	147	72	(119)
ACTUAL 1971 FINANCIAL PERFORMANCE UNDER COST ALLOCAT	10N III: HIG	GH VARIABLE	
A B C C C C C C C C C C C C C C C C C C	26	66	3
	29	65	5
	29	66	5
	30	62	8
	21	66	14
	27	69	4
	29	65	6
Market area 2:  J	10 23 (1) 17 (1) 18	84 78 (¹) 72 (¹) 75	(1) (1) 11 (1) 7
Market area 3: 0	19	68	13
	20	76	4
	17	74	10
	23	76	2
	21	71	9
	8	85	7
Market area 4:  U	19 24 23 24 17 19	72 70 70 73 74 75	6 7 3 8

PROJECTED FINANCIAL PERFORMANCE UNDER EVENT A: LOSS OF CHAIN SUPERMARKET SALES—COST ALLOCATION III: HIGH VARIABLE COSTS

Market area and bottler	Fixed costs	Variable costs	Soft drink operating profit or (loss)
Market area 1:			
A	29	76	(4)
C	35	66	(1)
D	39	65	(4)
Ē	35	66	0
F	37 26	62	1
G	42	66 69	8
H	42	65	(11)
Market area 2:	44	63	(7)
	18	84	(2)
J	35	78	(13)
K	(¹) 17		(1)
M	17	(¹) 72	ìí
N	(¹) 30	(¹) <b>7</b> 5	(1)
larket area 3:	30	<b>7</b> 5	(4)
0	29		
P	33	68 76	3
Q	67	74	(9)
R	64	76	(41)
S	35	71	
T	14	85	(5)
arket area 4:	• •	03	1
V	27	72	1
W	60	70	(30)
X	75	70	(46)
V	39	73	(11)
7	35	74	(9)
	41	75	(16)

A	33	76	(
0	40	66	(
U	45	65	(10
U	41	66	((
	47	62	à
	31	66	(,
G	47	69	(1
H.	49	65	(1
rket area 2:	10	0.5	(1
	23	84	,
	42	78	(1)
N			(1
	(¹) 25	(¹) 72	1
M	(1)	(1)	
N	(¹) 36	(¹) 75	
rket area 3:	00	7.5	(1
0	38	68	
<u></u>	42	76	()
¥	74	74	(1
K	82	76	(4)
S	43	71	(5)
	18	85	(1)
ket area 4:	10	03	(4
V	32	72	
V	87	70	(3
W	90	70	(57
X	40	73	(61
Y	44	73 74	(13
Z	62	74 75	(18

PROJECTED FINANCIAL PERFORMANCE UNDER EVENT C: LOSS OF CHAIN SUPERMARKET, GROCERY AND CONVENIENCE STORE SALES—COST ALLOCATION III: HIGH VARIABLE COSTS

Market area and bottler	Fixed costs	Variable costs	Soft drink operating profit or (loss)
Market area 1:  A	39	76	(15)
	47	66	(13)
	53	65	(19)
	49	66	(15)
	66	62	(28)
	38	66	(4)
	54	69	(24)
	58	65	(23)
Market area 2:	32	84	(16)
	51	78	(29)
	(1)	(¹)	(1)
	44	72	(16)
	(1)	(¹)	(1)
	45	75	(19)
Market area 3: 0	54	58	(22)
	57	76	(33)
	84	74	(57)
	113	76	(89)
	56	71	(27)
	24	85	(8)
Market area 4: U V V V V V V V V V V V V V V V V V V V	38 159 113 42 58 124	72 70 70 73 74 75	(10) (130) (83) (15) (32) (99)

<sup>1</sup> Not available.

APPENDIX C

SOFT DRINK PRICE INCREASES TO NONFOOD OUTLETS REQUIRED TO REGAIN 1971 PRETAX PROFITABILITY

[In percent]

				incre	ases und	er—			
	Cost	Cost allocation I			allocation	11	Cost	Cost allocation III	
Market area and bottler	Event A	Event B	Event C	Event A	Event B	Event C	Event A	Event B	Even (
arket area 1 : A	12 13 11 - 8 - 8 - 8 - 20 18	20 21 18 16 20 15 27 27	30 32 28 28 41 26 37 41	10 11 10 7 8 7 18 15	16 18 17 14 19 13 24 24	24 27 26 24 39 22 32 35	7 9 9 5 7 6 15	12 14 15 11 18 11 21 20	1 2 2 2 3 1 2 2
arket area 2: 	18 15 (¹)	28 22 (¹) 12 (¹) 22	45 33 (¹) 41 (¹) 33	13 13 (¹) (¹)	21 20 (¹) 10 (¹)	33 31 (¹) 34 (¹) 29	8 12 (¹)	13 18 (¹) - B (¹) 17	
arket area 3: 0	15 24 97 75 25	28 40 111 107 40 19	51 67 129 162 64 32	13 19 74 59 20 9	23 31 85 84 31	43 52 98 127 50 24	10 13 51 42 14	19 22 58 60 22 9	
larket area 4: U.V.W.XXX	9 42 . 73 18 30 31	14 73 94 20 45	22 157 125 22 70 144	8 39 63 16 23 27	13 68 81 18 35 51	20 146 108 20 55 125	8 36 53 14 17 22	12 63 68 16 26 43	1

<sup>1</sup> Not available.

APPENDIX II.—STATEMENT OF MR. CRAWFORD RAINWATER ON SOFT DRINK INDUSTRY, STATE PROFILES, 1970

#### INTRODUCTION

The soft drink industry is composed of thousands of small companies and plants built to serve local communities. Typically, the bottler employs less than 20 persons. This report shows in detail by state the number of companies, plants, size of employment, payroll, employees, sales, cost of materials, value added and taxes paid.

The data are for the most part from Government sources. Plants by employment category, payroll and average number of employees are from the 1970 County Business Patterns of the U.S. Department of Commerce, Sales of soft drinks and cost of materials are based on updated estimates of data appearing in the 1963, 1967 Census of Manufactures and the 1969 Annual Survey of Manufactures, publications of the U.S. Department of Commerce. Data on taxes are based on the 1968 NSDA Financial Survey. Because the estimates are based on 1968 data, they may be understated.

The report was prepared with the help of Arthur M. Stupay, an economic

consultant, Cleveland, Ohio.

#### NATIONAL SUMMARY

Soft drinks is a major category of the food industry, accounting for nearly 5 percent of aggregate food and beverage shipments. Soft drink manufacturers' sales in 1970 exceeded that of brewers (\$3.7 billion) and producers of distilled spirits (\$1.8 billion) as well as of cheese processing (\$2.2 billion), canned fruits and vegetables (\$3.6 billion)), frozen vegetables (\$2.8 billion) and confectionery products (\$3.3 billion). The industry employed some 125,000 persons nationally and had a payroll approximating \$800 million.

There were over 3,000 bottling plants nationally in 1970. Most were operated by 2,300 small businesses considered the backbone of the industry. Over 1,300 employed less than 20 persons each. Plants were located in every state, in all

the major cities and in many small towns serving rural areas.

Soft drink producers purchased goods and services from other firms valued at close to \$2.5 billion. They paid state and local taxes, excluding land and sales taxes, approximating \$61 million.

#### U.S. soft drink manufacturers

	Payroll \$800, 000, 000
	data rounded 125, 000 Sales—wholesale \$4, 700, 000, 000 Cost of materials \$2, 500, 000, 000
50-90 456	Taxes State and local \$2, 200, 000, 000
Over 100253 Number of cities with plants 1, 642	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

Source: County Business Patterns, U.S. Department of Commerce; Annual Census of Manufacturers, U.S. Department of Commerce; Financial Survey, National Soft Drink

# SOFT DRINK MANUFACTURING INDUSTRY STATISTICS BY STATE, 1970

State	Number of soft drink com- panies	Number of plants	Plants with less than 50 em- ployees	Cities with soft drink plants	Total em- ployees	Industry sales (millions)	Cost of materials (millions)	Taxes paid (millions)
Alabama Arizona Arkansas California Colorado Connecticut Delaware Florida	60 23 44 113 29 49 10 63	73 23 53 141 34 52 10 96	50 17 39 106 28 40 8	37 8 30 71 16 32 3 43	2, 937 792 1, 996 6, 900 2, 000 1, 718 227 4, 693	\$82 41 49 380 38 51 14 168	\$43 20 23 220 19 30 8 89	\$1. 25 . 55 . 75 4. 90 . 55 . 85 . 30 3. 25

State	Number of soft drink com- panies	Number of plants	Plants with less than 50 em- ployees	Cities with soft drink plants	Total em- ployees	Industry sales (millions)	Cost of materials (millions)	Taxes paid (millions)
	63	98	73	54	4, 893	\$132	\$59	\$2. 2
orgia	17	17	17	8	373	14	7	. 23
aho aho	99	112	83	59	6, 086	273	138	2. 7
nois	67	82	62	49	3, 438	133	66	1. 2
diana	40	42	33	26	1, 588	54	25	. 81
wa	35	38	32	20	1, 418	35	16	. 6
insas	49	62	47	37	3, 573	158	90	1.7
entucky	44	54	38	28	3, 184	90	49	1. 7.
uisiana	26	28	26	19	468	19	12	
aine	27	36	25	18	2, 300	119	62	1.7
aryland	81	85	67	57	2, 566	123	69	1. 4
assachusetts	72	84	62	48	4,670	205	107	1. /
chigan	48	60	48	38	2, 167	56	25	1. 0
innesota	50	66	51	41	2, 202	62		1. 7
ississippi	68	77	61	40	3, 561	130		1. ;
issouri	23	25	20	17	362	14		: 1
ontana	30	31	26	19	1, 255	32		: :
ebraskaebraska_	11	11	9	. 5	214	12		
ew Hampshire	14	15	13	11	650	28		2.
ew Jersey	84	91	65	47	3, 395	206		۷٠,
ew Mexico	25	27	25	14	707	22		4.
ew York State	146	171	137	79	7, 500			2.
orth Carolina	84	114	73	54	5, 093			2.
orth Dakota	13	13	13	10	266			2.
hio	80	110	72	49	7, 268			
klahoma	47	52		29	1, 998			
regon	32	35		20	5. 800			3.
ennsylvania	210	234		136	375		,	
hode Island	19	19		12	2, 562		1	1.
outh Carolina	48	63		37	2, 362		-	**
outh Dakota.	9			7	3, 799			1.
ennessee	63			38 162	9, 720			2.
exas	166			102	652			
tah	23				160		6 4	
ermont	10			5	4. 136			1.
irginia	47			34	1, 359	,		1.
ashington	31			18 26	1, 55			
Vest Virginia	46			72	2, 64			
Visconsin	102	111		6	12		7 3	
Vyoming	G	10	) 10	0	12			
,	2, 549	3, 027	2, 318	1, 642	126, 34	3 4, 75	1 2, 489	60.

# SOFT DRINK INDUSTRY PROFILE, ALABAMA, 1970

Sales of soft drinks produced by Alabama bottlers totaled an estimated \$82 million in 1970, exceeding shipments of many categories of the food, textile, apparel and paper industries. Alabama bottlers employed over 2.900 persons with a payroll of nearly \$15 million. There were 73 plants located in the state in 1970, with 50 of them employing less than 50 persons each. The plants were located in 37 cities throughout the state. The bottlers purchased goods and services totaling \$43 million in 1970. Taxes paid, exclusive of land and sales taxes, were an estimated \$1 million to \$1.5 million.

# Alabama Soft Drink Manufacturers

Number of plants Single-plant firms Multiplant firms Domestic ownership Plants by number of employees:	44 Number of employees (av- 16 erage)
--	--

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, ARIZONA, 1970

Sales of soft drinks produced by Arizona bottlers totaled an estimated \$41 million in 1970. The bottlers employed 792 persons with a payroll of \$4.5 million. Employment and payroll of the bottlers topped that of many categories of the food processing, apparel, paper and chemical industries. There were 23 plants located in the state in 1970. Only one had more than 100 employees. Plants were located in eight cities throughout the state. The bottlers purchased goods and services from other firms estimated at \$20 million. They paid taxes, excluding land and sales taxes, estimated at between \$500,000 to \$600,000.

# Arizona soft drink manufacturers

Single-plant firms 23 Multi-plant firms 6 Domestic ownership 19 Plants by number of employees:	Payroll
---	---------

# SOFT DRINK INDUSTRY PROFILE, ARKANSAS, 1970

Sales of soft drinks produced by Arkansas bottlers totaled an estimated \$49 million in 1970. Shipments exceeded those of the major sub-groups of textiles, apparel, and many industrial products. The bottlers employed some 2.000 persons in 1970, with a payroll of \$10 million. There were 53 bottling plants in 1970. Most of them were small, employing less than 50 persons. They were located in 30 cities throughout the state. Arkansas bottlers purchased goods and services from other firms totaling an estimated \$23 million in 1970. They paid taxes, excluding land and sales taxes of close to \$1 million.

#### Arkansas soft drink manufacturers

Number of firms	30 14 37	Payroll Number of employees (average) Sales—wholesale Cost of materials Value added Taxes, State and local	1, 996 \$49, 000, 000 \$23, 000, 000 \$26, 000, 000
The ball of the second	90 1		

#### <sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, CALIFORNIA, 1970

The soft drink industry sales in California reached an estimated \$380 million in 1970, exceeding many food categories, clothing items, and fabricated metal products. The bottlers employed some 6,900 people with a payroll of \$55 million, more than the number of employees and the payroll of the wine industry. There were 141 plants, a sizeable number. Three-quarters or 106 plants employed less than 50 people. Some 71 cities in the state had a soft drink plant. The industry bought over \$200 million of materials and services. The industry paid approximately \$5 million in local and state taxes.

# California soft drink manufacturers

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, COLORADO, 1970

Sales of soft drinks produced by Colorado bottlers totaled an estimated \$38 million in 1970. The bottlers employed 2.000 persons and had a payroll of over \$10 million. Employment and payroll of the bottlers topped that of major sectors of the food industry, apparel, lumber and wood products, furniture, paper converting and chemical industries. There were 34 plants in Colorado in 1970. The plants were located in 16 cities throughout the state. The bottlers purchased goods and services from other firms valued at \$19 million. They paid taxes, excluding land and sale taxes, aggregating over \$500,000.

# Colorado soft drink manufacturers

Cotortia sort	(er trote recovery)
Number of firms	29 Payroll\$10, 000, 000  34 Number of employees 23 (average)\$2, 000  Sales—wholesale\$38,000, 000  Value added\$19, 000, 000  Taxes. State and local\$500-\$600

<sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, CONNECTICUT, 1970

Connecticut bottler's sales of soft drinks totaled an estimated \$51 million in 1970. They exceeded volume of segments of the processed food industry and selected industrial products. The bottlers employed over 1,700 persons in 1970 with a payroll of \$12 million. There were 52 plants located throughout the State. Most were small: only 12 plants had more than 50 employees in 1970. Plants were located in 32 communities. The bottlers bought \$30 million in products and services from other firms. Taxes paid by bottlers (excluding land and sales taxes) are estimated at close to \$1 million.

# Connecticut soft drink manufacturers

Number of firms	49 52 43 6 46	Number of cities with plants       32         Payroll       \$12,000,000         Number of employees (average)       1,718         Sales, wholesale       \$51,000,000         Cost of materials       \$30,000,000         Value added       \$21,000,000         1,718       \$21,000,000         \$21,000,000       \$21,000,000
Plants by number of employees:  1-49  Over 100	40 9 3	Cost of materials \$21,000,000  Value added \$21,000,000  Taxes, State and local \$0.7-1.0

<sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, DELAWARE, 1970

Soft drink sales of Delaware bottlers reached an estimated \$14 million in 1970, exceeding that of many segments of the food industry. The bottlers employed an estimated 227 persons in 1970 with a payroll of \$1.7 million. There were 10 plants in the State and all but two had less than 50 employees. The industry purchased products and services estimated at \$8 million in 1970. Taxes paid by the bottlers amounted to between \$200.000 and \$400.000, excluding land and sales taxes.

#### Delaware soft drink manufacturers

plants 3   1 Excludes land and sales taxes.
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Sales of soft drinks produced by Florida bottlers totaled an estimated \$168 million in 1970. They were in the leading beverage produced in the State, exceeded sales of other major food categories, textiles and clothing, converted paper products, chemical specialties and other industrial product groups. There were 96 plants located in 43 communities throughout the State. Two-thirds of the plants were small, employing less than 50 persons each. Florida bottlers employed close to 4.700 persons, with a payroll of \$27 million. The bottlers purchased goods and services from other firms estimated at \$89 million in 1970. Taxes paid, excluding sales and land taxes, are estimated at between \$3 million to \$3.5 million in 1970.

SOFT DRINK INDUSTRY PROFILE, FLORIDA, 1970

#### Florida soft drink manufacturers

Number of plants 96	Payroll   \$27,000,000   Number   of employees
Multiplied Commission 47	(average) 4,693
Multiplant nrms 16	Sales, wholesale \$168,000,000
Domestic ownership 56	Costs of materials \$89 000 000
Plants by number of employees:	Value added \$79,000,000
1-49 62	Taxes, State and local 2 \$3,000,000-
50-99 23	\$3, 500, 000
Over 100 11	\$5, 500, 000
Number of cities with	
plants 43	
1 Eveludes land and sales taxes	

#### SOFT DRINK INDUSTRY, GEORGIA, 1970

Sales of soft drinks produced by bottlers in Georgia totaled an estimated \$132 million in 1970. Soft drinks were the major beverage produced in the state and exceded shipments of many apparel items and industrial products. There were 98 plants in 1970, with 73 employing less than 50 persons each. They were located in 54 communities throughout the state. The bottlers employed some 4,900 persons with a payroll of \$28 million. Georgia bottlers purchased goods and services from other firms totaling an estimated \$59 million in 1970. They paid local and state taxes, excluding land and sales taxes, of between \$2 million and \$2.5 million.

# Georgia Soft Drink Manufacturers

Number of plants 98	B Payroll \$28, 000, 000
Single-plant firms 48 Multiplant firms 19 Domestic ownership 58 Plants by number of employees:	erage) 4, 893 Sales, wholesale \$132,000,000 Cost of materials \$59,000,000 Value added \$73,000,000 Taxes, State and local \$2,000,000 \$2,500,000

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE, IDAHO, 1970

Sales of soft drinks produced by Idaho bottlers totaled an estimated \$14 million in 1970. They employed over 370 persons with a payroll of some \$2 million. Soft drinks were virtually the only beverage produced in the state. There were 17 bottling plants in the state in 1970. All were small. The plants were located in eight cities throughout the state. Boise, Coeur d'Alene, Idaho Falls, Lewiston, Payette, Pocatello, Twin Falls and Weiser. The bottlers purchased goods and services from other firms totaling some \$7 million. They paid taxes, excluding sales and land taxes, estimated at approximately \$200,000.

#### Idaho Soft Drink Manufacturers

Number of firms	17	Payroll	\$2,000,000
Number of plants	17	Number of employees (av-	
Single-plant firms	16	erage)	373
Multiplant firms			
Domestic ownership			
Plants by number of employees:		Value added	\$7,000,000
1-49			
50-99			
Over 100			
Number of cities with plants			
1 The shade of the shade of the shade of			

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE ILLINOIS 1970

Sales of soft drinks produced by Illinois bottlers totaled an estimated \$273 million. The bottles employed over 6,000 persons with a payroll of \$49 million. Employment and payroll of the bottlers exceeded the level of other groups including dairy, other beverage, textile, apparel, paper converting and plastic materials. There were 112 plants in the state. The plants were located in 59 cities throughout the state. The bottlers purchased goods and services from other firms, valued at \$138 million. Taxes paid, excluding land and sales taxes, were estimated at between \$2.5 million to \$3 million.

#### Illinois Soft Drink Manufacturers .

		Payroll \$49,000,000
Numbers of plants 1	12	Number of employees
Single-plant firms	87	(average) 6,086
Multiplant firms	12	Sales, wholesale \$273,000,000
Domestic ownership	94	Cost of materials \$138,000,000
Plants by number of employees:		Value added \$135,000,000
1-49	83	Taxes, State and
50-99	16	local 1 \$2, 500, 000-\$3, 000, 000
Over 100	13	
Number of cities with plants	59	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE INDIANA 1970

Sales of soft drinks produced by Indiana bottlers totaled an estimated \$133 million in 1970. The bottlers employed over 3,400 persons and had an aggregate payroll of \$23 million. There were \$2 plants in 1970, with 62 employing less than 50 persons. They were located in 49 cities throughout the state. The bottlers purchased goods and services from other firms totaling \$66 million in 1970. They paid taxes, excluding land and sales taxes, estimated at \$1 million to \$1.5 million.

#### Indiana Soft Drink Manufacturers

2 to the total of the sale of					
Number of firms		Payroll \$23, 000, 000			
Number of plants		Number of employees			
Single-plant firms	54	(average)			
Multiplant firms	13	Sales, wholesale \$133, 000, 000			
Domestic ownership	59	Cost of materials \$66, 000, 000			
Plants by number of employees:		Value added \$67, 000, 000			
1-49	62	Taxes, State and			
50-99	13	local 1 \$1, 000, 000-\$1, 500, 000			
Over 100	7				
Number of cities with plants	49				

<sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, IOWA, 1970

Sales of soft drinks produced by Iowa bottlers totaled an estimated \$54 million in 1970. The bottlers employed some 1,600 people and had a payroll of \$11 million. There were 42 plants in the state in 1970, with all but nine plants employing less than 50 persons. The plants were located in 26 cities throughout the state. The bottlers purchased goods and services from other firms valued at \$25 million. They paid taxes excluding sales and land taxes, estimated at between \$750,000 to \$1 million.

# Iowa Soft Drink Manufacturers

Number of firms	42 34 6 37 33 5 4	
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<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, KANSAS, 1970

Sales of soft drinks produced by Kansas bottlers totaled an estimated \$35 million in 1970. The bottlers employed over 1,400 persons with a total payroll approaching \$9 million. There were 38 bottling plants in the state in 1970 with all but six plants employing less than 50 persons each. The plants were located in 20 cities throughout the state. The botlers purchased goods and services from other firms totaling an estimated \$16 million. They paid taxes estimated at between \$500,000 to \$750,000.

# Kansas Soft Drink Manufacturers

Number of firms Number of plants Single-plant firms Multiplant firms Domestic ownership Plants by number of employees: 1-49 50-99 Over 100	32 32 4 2	Number of employeesSales, wholesaleState and localState and local	1, 418 \$35, 000, 000 \$16, 000, 000 \$19, 000, 000
Number of cities with plants	20		
- The of Cities with plants	20		

<sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, KENTUCKY, 1970

Sales of soft drinks produced by Kentucky bottlers totaled an estimated \$158 million in 1970. The bottlers employed close to 3.600 persons with a payroll aggregating \$25 million. There were 62 bottling plants in the state in 1970. Most were small; 47 employed less than 50 persons each. The plants were located in 37 cities throughout the state. The bottlers purchased goods and services from other firms valued at an estimated \$90 million. They paid taxes, excluding land and sales taxes, of between \$1.5 million to \$2 million.

# Kentucky soft drink manufacturers

	02	Payroll Sumber of employees \$25,000,000
Multiplant firms Domestic ownership	36 13	(average) 3, 573 Sales, wholesale \$158, 000, 000
Plants by number of employees: 1-49 50-99	47	
Over 100 Number of cities with plants	6.1	

<sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, LOUISIANA, 1970

Sales of soft drinks produced by Louisiana bottlers totaled an estimated \$90 million in 1970. They exceeded shipments of major categories of canned foods, meat, textiles, furniture and industrial items including metal working machinery. There were 54 plants in 1970. Most were small; 38 had less than 50 employees each. The plants were located in 28 communities, many in small towns serving the rural areas. The bottlers employed nearly 3,200 persons and had a payroll of \$17 million. The bottlers purchased goods and services from other firms totaling \$49 million. They paid taxes, excluding land and sales taxes of some \$1.5 million to \$2 million.

# Louisiana soft drink manufacturers

<sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, MARYLAND, 1970

Soft drink sales (production) totaled some \$19 million in 1970, exceeding output of beer and other beverages, selected processed foods and a variety of manufactured products including furniture and several apparel items. The bottlers employed close to 500 persons in 1970 with a payroll of \$2.8 million. There were 28 plants in operation in 1970, almost all of which employed less than 50 persons, located in 19 cities throughout the State. The Maine bottling industry purchased an estimated \$12 million of products and services from other firms. Taxes paid totaled an estimated \$300,000.

### Maine Soft Drink Manufacturers

Number of firms	28 23 3 25	Number of cities with plants       19         Payroll       \$2,800,000         Number of employees       (average)         Sales, wholesale       \$19,000,000         Cost of materials       \$12,000,000         Value added       \$7,000,000         Taxes, State and local       \$300,000
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<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, MARYLAND, 1970

Soft drinks produced in Maryland totaled an estimated \$119 million in 1970. The bottlers employed 2,300 persons with a payroll of \$16 million. There were 36 plants in the State in 1970 with 25 plants employing less than 50 workers each. The industry purchased products and services estimated at \$62 million in 1970. The bottling companies paid State and local taxes approximating \$1.5 to \$2 million.

# Maryland soft drink manufacturers

Number of plants       36       Fayron       \$15,000,000         Single-plant firms       9       Number of employees       2,300         Multiplant firms       9       (average)       2,300         Domestic ownership       23       Sales, wholesale       \$119,000,000         Plants by number of employees:       Cost of materials       \$62,000,000         Value added       \$57,000,000         Taxes, State and local       \$20,000,000	Marytana soft artine meeting action of		
Over 100 4. (million) 22 \$\pi_2\$,000,000	Number of plants Single-plant firms Multiplant firms Domestic ownership Plants by number of employees:	36 18 9 23 25	Payroll       \$16,000,000         Number of employees       2,300         (average)       2,300         Sales, wholesale       \$119,000,000         Cost of materials       \$62,000,000         Value added       \$57,000,000

<sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE, MASSACHUSETTS, 1970

Soft drink industry sales in Massachusetts reach \$123 million in 1970. The bottlers employed more people and had a larger payroll than the brewers and firms producing distilled spirits. The bottlers employed over 2,500 persons, with a payroll in excess of \$17.5 million. There were 85 plants in Massachusetts in 1970 and nearly 80 percent or 67 plants employed less than 50 workers each. Plants were located in all parts of the state, in 57 cities. The industry bought an estimated \$69 million of materials and services from other firms mainly in the state and paid an estimated \$1.4 million in taxes.

#### Massachusetts Soft Drink Manufacturers

Number of firms	85 72 9 75	Payroll\$17, 500, 000  Number of employees (average) 2, 566  Sales, wholesale\$123, 000, 000 Cost of materials\$69, 000, 000  Value added \$54, 000, 000  Taxes, State and local1\$1, 400, 000

#### SOFT DRINK INDUSTRY PROFILE, MICHIGAN, 1970

Sales of soft drinks produced by Michigan bottlers totaled an estimated \$205 million in 1970. The bottlers employed some 4,700 persons in 1970, with a payroll of \$37 million. There were 84 plants in the state with 62 plants employing less than 50 persons each. The plants were located in 48 cities. The bottlers bought goods and services from other firms totaling \$107 million. Taxes paid by bottlers, excluding land and sales taxes, totaled between \$1.5 million to \$2 million.

#### Michigan Soft Drink Manufacturers

Number of plants         8           Single-plant firms         6           Multiplant firms         1           Domestic ownership         6           Plants by number of employees:         1           1-49         6           50-99         1           Over 100         1	2 Payroll \$37, 000, 000  Number of employees (average) 4, 670  Sales, wholesale \$205, 000, 000 Cost of materials \$107, 000, 000 Value added \$98, 000, 000  Taxes, State and local \$1,500,000 to \$2,000,000
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#### SOFT DRINK INDUSTRY PROFILE, MINNESOTA, 1970

Sales of soft drinks produced by Minnesota bottlers totaled an estimated \$56 million in 1970. The bottlers employed close to 2,200 persons and had a payroll of \$14.5 million. There were 60 plants in the state in 1970. Most were small; all but 12 had 50 employees or less. The plants were located in 38 cities throughout the state. The bottlers purchased goods and services from other firms totaling \$25 million in 1970. They paid taxes, excluding sales and land taxes, totaling an estimated \$750,000 to \$1 million.

#### Minnesota Soft Drink Manufacturers

Number of firms	60 37 11 47 48 6	Number of cities with plants
	6	

# SOFT DRINK INDUSTRY PROFILE, MISSISSIPPI, 1970

Sales of soft drinks produced by Mississippi bottlers totaled an estimated \$62 million, exceeding many categories of the food, paper, construction materials and metal fabricating industries. The bottlers employed 2,200 persons in 1970, with a payroll of \$11 million. There were 66 plants in the state, with 51 employing less than 50 persons each. The plants were located in 41 communities throughout the state. Bottlers purchased goods and services valued at \$28 million from other firms in 1970. They paid taxes, excluding land and sales taxes, of about \$1 million.

# Mississippi Soft Drink Manufacturers

Number of firms Number of plants Single-plant firms Multiplant firms Domestic ownership Plants by number of employees: 1-49 50-99 Over 100	66 H 37 D 13 45 S 51 N	Number of cities with plants 41 Payroll \$11, 000, 000 Number of employees
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<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, MISSOURI, 1970

Sales of soft drinks produced by Missouri bottlers totaled an estimated \$130 million in 1970. The bottlers employ over 3,500 persons with a payroll of \$26 million. Employment and payroll of the bottlers exceeded that of many categories of the processed foods, apparel, paper converting, chemical and metal fabricating industries. There were 77 plants located in the State in 1970. Most were small; 61 plants employed less than 50 persons each. The bottlers purchased goods and services from other firms valued at \$59 million. They paid taxes, excluding land and sales taxes, estimated at between \$1.5 million to \$2 million.

# Missouri soft drink manufacturers

Number of plants       77         Single-plant firms       50         Multiplant firms       18         Domestic ownership       56         Plants by number of employees:       61         50-99       9         Over 100       7	
Number of cities with plants 40	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, MONTANA, 1970

Sales of soft drinks produced by Montana bottlers totaled an estimated \$14 million in 1970. The bottlers employed over 350 persons, with a payroll of \$2 million. Employment and payroll of the bottlers exceeded that of major categories of the food, paper converting, chemical and fabricated metal products industries. There were 25 plants located in the state in 1970; most were small with less than ten employees. The bottlers purchased goods and services from other firms totaling \$7 million. They paid taxes, excluding land and sales taxes, approximating \$200,000.

#### Montana soft drink manufacturers

Number of firmsNumber of plants		Payroll Number of employees	\$2,000,000
Single-plant firms	21	(average)	362
Multiplant firms	2	Sales, wholesale	\$14,000,000
Domestic ownership	23	Cost of materials	\$7,000,000
Plants by number of employees:		Value added	\$7,000,000
1 to 49		Taxes, State and local	, , ,
50 to 99	4	<sup>1</sup> \$200,	000-\$250,000
Over 100	1	, ,	1 ,
Number of cities with plants	17		

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE, NEBRASKA, 1970

Sales of soft drinks produced by Nebraska bottlers totaled an estimated \$32 million in 1970. The bottlers employed 1,255 persons in 1970 and had a payroll estimated at \$8.5 million. There were 31 plants in the state in 1970. Most were small; 17 employed fewer than 20 persons. The bottlers purchased goods and services from other firms estimated at \$15 million. They paid taxes estimated at close to \$450,000.

#### Nebraska Soft Drink Manufacturers

Number of firms	30	Payroll \$8,500,000
Number of plants	31	Number of employees (aver-
Single-plant firms	25	age) 1, 255
Multiplant firms		Sales, wholesale \$32,000,000
Domestic ownership	28	Cost of materials \$15,000,000.
Plants by number of employees:		Value added \$17,000,000
1 to 49	26	Taxes, State and
50 to 99		local 1 \$400, 000-\$500, 000
Over 100	1	
Number of cities with plants	_19	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE, NEVADA, 1970

Sales of soft drinks produced by Nevada bottlers totaled an estimated \$12 million in 1970. The bottlers employed 214 persons and had a payroll of \$1.7 million. Employment and payroll of the bottlers topped that of many categories of food processing, apparel, most chemicals and fabricated metal products industries. There were 11 plants in the state in 1970. The bottlers purchased goods and services from other firms estimated at \$6 million. They paid taxes, excluding land and sales taxes, estimated at between \$150,000 to \$250,000.

#### Nevada Soft Drink Manufacturers

Number of firms	11	Payroll \$1,700,000
Number of plants	11	Number of employees
Single-plant firms	7	(average) 214
Multiplant firms	4	Sales, wholesale \$12,000,000
Domestic ownership	8	Cost of materials \$6,000,000
Plants by Number of employees:		Value added \$6,000,000
1 to 49	9	Taxes, State and
50 to 99		local 1\$150, 000-\$250, 000
Over 100	0	
Number of cities with plants	- 5	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, NEW HAMPSHIRE, 1970

Soft drink sales of New Hampshire bottlers reached an estimated \$28 million in 1970, exceeding output of many processed food items, apparel and even chemicals and segments of the electronic and machinery industries. The bottlers employed an estimated 650 people, with a payroll of \$4.5 million. There were 15 plants in the state and all but two had less than 50 employees. Plants were located througout the state in 11 cities. The industry purchased products and services estimated at \$15 million in 1970. Taxes (excluding land taxes and sales taxes) paid amounted to between \$300,000 and \$500,000.

# New Hampshire Soft Drink Manufacturers

Number of firms	15 10 4 11 13 2	·	650 000, 000 000, 000 000, 000
50-90 Over 100 Number of cities with plants	$\frac{2}{0}$	Q.	\$500,000

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, NEW JERSEY, 1970

Soft drink sales of New Jersey bottlers approximated \$206 million in 1970, exceeding output of several food categories, fluid milk, bread, and confectionery. There were 91 plants in the state in 1970, with 65 plants employing less than 50 persons each. The plants were located in 47 communities. The bottlers employed 3,400 persons, with a payroll of \$26 million. The industry bought \$130 million of products and services from other firms, many of whom were in the state. The bottlers paid between \$2.5 and \$3 million in taxes, excluding land and sales taxes.

### New Jersey Soft Drink Manufacturers

Number of firms	84	Payroll	\$26, 000, 000
Mumbar of plants	91	Number of employees	
Single plant firms	73	(average)	3, 395
Multiplant firms	11	Sales, wholesale	\$206, 000, 000
Domestic ownership	76	Cost of materials	\$130, 000, 000
Plants by number of employees:		Value added	\$ 76,000,000
1 10	65	Taxes, State and	
50-99	26	local \$2,500,0	000-\$3, 000, 000
Over 100	0		
Number of cities with plants			

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

# SOFT DRINK INDUSTRY PROFILE, NEW MEXICO, 1970

Sales of soft drinks produced by New Mexico bottlers totaled an estimated \$22 million in 1970. They employed over 700 persons with a payroll of close to \$4 million. Employment and payroll of the bottlers exceeded that of other beverage producers, processed food manufacturers and chemical and fabricated metal industries. There were 27 bottling plants in the state in 1970 and all but two had less than 50 employees each. The bottlers purchased goods and services from other firms estimated at \$11 million. They paid taxes estimated between \$250,000 and \$350,000, excluding land and sales taxes.

#### New Mexico soft drink manufacturers

Number of firmsNumber of plants		Payroll \$3, 800, 000 Number of employees
Single-plant firms		(average) 707
Multiplant firms	5	Sales, wholesale \$22,000,000
Domstic ownership	23	Cost of materials \$11,000,000
Plant by number of employees:		Value added\$11,000,000
		Taxes, State and
50-99		local 1 \$250, 000-\$350, 000
Over 100	1	
Number of cities with		
plants	14	

#### <sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE, NEW YORK STATE, 1970

Industry sales of local plants in the State of New York approximated \$402 million in 1970. The bottlers employer some 7.500 persons with an aggregate payroll of \$60 million. Industry employment and payroll topped that for many segments of the apparel, paper converting and other industries. There were 171 plants located in 79 cities. Most plants were small, employing less than 50 persons. The industry bought products and services from other firms totaling some \$235 million in 1970. The bottlers paid an estimated \$4.5 million in taxes (excluding land and sales taxes).

#### New York soft drink manufacturers

Number of firms146	Number of cities with
Number of plants 171	plants 79
Single-plant firms127	Payroll \$60,000,000
Multiplant firms 19	Number of employees
Domestic ownership 139	(average) 7,500
Plants by number of employees:	Sales, wholesale \$402,000,000
1-49 137	Cost of materials \$235, 000, 000
50-99 21	Value added\$167, 000, 000
Over 100 13	Taxes, State, and local 1\$4,500,000

<sup>1</sup> Excludes land and sales taxes.

#### SOFT DRINK INDUSTRY PROFILE, NORTH CAROLINA, 1970

Sales of soft drinks produced by North Carolina bottler totaled an estimated \$160 million. The bottlers employed close to 5,100 persons with an aggregate payroll of \$30 million. Soft drinks were the dominant beverage produced in the state. There were 114 plants in the state in 1970. Most were small; 73 employed 50 people or less. The bottler purchased goods and services from other firms valued at \$76 million. They paid taxes, excluding land and sales taxes, of between \$2 million and \$2.5 million.

### North Carolina soft drink manufacturers

Number of firms	84	Payroll \$30,000,000
Number of plants		Number of employees
Single-plant firms	65	(average) 5,093
Multiplant firms	11	Sales—Wholesale \$160,000,000
Domestic ownership	81	Cost of materials \$76,000,000
Plants by no. of employees		Value added \$87, 000, 000
1-49	73	Taxes, State and
50-99	32	local 1 \$100, 000-\$200, 000
over 100	9	
Number of cities with plants	54	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, NORTH DAKOTA, 1970

Sales of soft drinks produced by North Dakota bottlers totaled an estimated \$10 million in 1970. The bottlers employed some 266 persons and had a payroll of \$1.5 million. There were 13 plants located throughout the state; all were small, employing 50 persons or less. The bottlers purchased goods and services from other firms totaling \$5 million. They paid taxes estimated at between \$100,000 and \$200,000, excluding land and sales taxes.

### North Dakota soft drink manufacturers

# SOFT DRINK INDUSTRY PROFILE, OHIO, 1970

Sales of soft drinks produced by Ohio bottlers totaled an estimated \$265 million in 1970. The bottlers employed some 7,360 persons with a payroll of \$52 million. Employment and payroll of the bottlers exceeded that of producers of canned and frozen foods, other beverages, most apparel groups, paper converting and plastics. There were 110 plants; 72 employed less than 50 persons each. The plants were located in 49 cities throughout the state. The bottlers purchased goods and services from other firms valued at \$127 million in 1970. They paid taxes, excluding land and sales taxes, estimated between \$2.5 and \$3 million.

### Ohio solft drink manufacturers

Number of firmsNumber of plantsNumber of plants	110 61 19 72	Number of cities with plants
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# SOFT DRINK INDUSTRY PROFILE, OKLAHOMA, 1970

Soft drink sales of Oklahoma bottlers totaled an estimated \$58 million in 1970. The bottlers employed close to 2,000 persons with a payroll of over \$10 million. Employment and payroll of the bottlers exceeded that of major categories of the food processing industry, including producers of canned fruit and vegetables, confectionery, as well as of apparel, paper converting and chemical industries. There were 52 bottling plants in Oklahoma in 1970. The plants were located in 29 cities throughout the state. The bottlers purchased goods and services from other firms valued at \$27 million. They paid taxes, excluding land and sales taxes, estimated at over \$400,000.

# Oklahoma soft drink manufacturers

Number of firms Number of plants Single-plant firms Multiplant firms Domestic ownership Plants by number of employees: 1-49 50-99 Over 100	52 39 8 45	Number of cities with plants
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<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, OREGON, 1970

Soft drink industry sales in Oregon approximated \$30 million in 1970, exceeding sales of many food items, other beverages and a variety of products used by industry including chemical specialties and several machinery categories. The bottlers employed some 725 persons in 1970, with a payroll of nearly \$6 million. There were 35 bottling plants in the state and all but three had less than 50 employees each. Plants were located in 20 cities through the state in both the major centers and in the rural areas. The industry purchased an estimated \$18 million in products and services from other firms. The bottlers paid an estimated \$400,000 to \$500,000 in taxes in 1970.

### Oregon soft drink manufacturers

Number of firms Number of plants	32 35	
Single-plant firms	27	
Multi-plant firms	5	
Domestic ownership	3(+	Cost of materials \$18,000,000
Plants by number of employees:		Value added\$12,000,000
1-49	32	Taxes, State and
50-99	1	
Over 100	2	
Number of cities with plants	20	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, PENNSYLVANIA, 1970

Soft drink sales of Pennsylvania bottlers reached \$256 million in 1970. Industry volume topped that of beer, processed fruits and vegetables, and confectionery. The industry employed 5.800 persons with a payroll of \$40 million. Pennsylvania had the largest number of plants in the nation, 234; most were small, with less than 50 employees. Plants were located in 136 cities throughout the state, in the small towns as well as in the large metropolitan areas. Pennsylvania bottlers purchased \$146 million in products and services from other firms, mainly in the state. The bottlers paid an estimated \$3 to \$3.5 million in taxes, excluding land and sales taxes.

### Pennsylvania soft drink manufacturers

	- 3	
Number of firmsNumber of plants	$\begin{array}{c} 210 \\ 234 \end{array}$	Payroll \$40,000,000 Number of employees
Single-plant firms		(average) 5,800
Multi-plant firms	23	Sales, wholesale \$256, 000, 000
Domestic ownership	201	Cost of materials \$146,000,000
Plants by number of employees:		Value added \$110,000,000
1-49	202	Taxes, State and
50-99	20	local 1 \$3, 000, 000-\$3, 500, 000
Over 100	12	
Number of cities with plants	136	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, RHODE ISLAND, 1970

Sale of soft drinks produced by Rhode Island bottlers totaled an estimated \$14 million in 1970. The bottlers employed some 375 people with a payroll estimated at \$2.5 million. There were 19 plants in the state in 1970. Most were small, employing less than 20 persons. The plants were located in 12 cities throughout the state. The bottlers purchased goods and services from other firms estimated at \$8 million. They paid taxes excluding land and sales taxes of some \$175,000.

### Rhode Island soft drink manufacturers

Number of firms	19	Payroll	\$2,500,000
Number of plants	19	Number of employees	4
Single-plant firms	15	(average)	375
Multiplant firms	4	Sales—wholesale	\$14,000,000
Domestic ownership		Cost of materials	
Number of cities with		Value added	
plants	12	Taxes, state, and local	<sup>1</sup> \$175, 000

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, SOUTH CAROLINA, 1970

Sales of soft drinks produced by bottlers in South Carolina totaled some \$70 million in 1970. They were the only beverages produced in the state and shipments exceeded most categories of meat, canned food products, dairy, and ranked high in relation to industrial products, including paperboard cartons and metal working products. There were 63 plants in 1970, located in 37 communities throughout the state. The bottlers employed some 2,500 people with a payroll of \$13.4 million. The bottlers purchased goods and services from other firms valued at \$41 million in 1970. Taxes paid in 1970, excluding land and sales taxes, are estimated at \$1 million to \$1.5 million.

### South Carolina soft drink manufacturers

Over 100 8 Taxes, state, and local \$\frac{1}{5}1,000,000-\$1,500,000
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<sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, SOUTH DAKOTA, 1970

Sales of soft drinks produced by South Dakota bottlers totaled an estimated \$8 million in 1970. The bottlers employed 276 people with an aggregate payroll of over \$1.3 million. Employment and payroll of the bottlers topped that of many categories of the processed food, apparel, fabricated metal and machinery industries. There were 11 plants in the state in 1970; all were small, with all but one employing less than 25 persons. The bottlers purchased goods and services from other firms valued at some \$4 million. They paid taxes, excluding land and sales taxes, estimated at between \$75,000 to \$150,000.

### South Dakota soft drink manufacturers

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, TENNESSEE, 1970

Sales of soft drinks produced by Tennessee bottlers totaled an estimated \$109 million in 1970. Soft drinks were the dominant beverage produced in the state, and shipments accounted for two-thirds of shipments of all beverages. The bottlers employed 3,800 persons, with a payroll of \$10 million. There were 77 plants in the state with all but 20 employing less than 50 persons. The bottlers bought goods and services from other firms totaling some \$50 million in 1970. They paid taxes, excluding land and sales taxes, of between \$1.5 million and \$2 million.

### Tennessee soft drink manufacturers

Number of firms 63 Number of plants 77	Payroll \$10,000,000
Multiplant firms 49  Domestic ownership 57	erage) 3, 799 Sales—wholesale \$109, 000, 000 Cost of materials
1-49 57	Value added eze oog oog
Over 1008 Number of cities with plants38	

<sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, TEXAS, 1970

Sales of soft drinks produced by Texas bottlers totaled an estimated \$293 million in 1970. They employed over 9,700 persons with a payroll of \$52 million. Employment and payroll of the bottlers exceeded that for most food processors and many sectors of the apparel, furniture, paper and plastics industries. There were 198 plants in the state in 1970; 143 plants employed less than 50 persons each and 68 plants employed less than 20 persons. The plants were located in 102 cities throughout the state. The bottlers purchased goods and services from other firms valued at \$135 million. They paid taxes, excluding land and sales taxes, estimated between \$2 million and \$2.5 million.

### Texas soft drink manufacturers

Number of firmsNumber of plants	166 198	Payroll \$52, 000, 000 Number of employees
Single-plant firms Multiplant firms Domestic ownership	136 30	(average) 9, 720 Sales—wholesale \$293 000 000
Plants by number of employees 1-49	143	Cost of materials \$135, 000, 000 Value added \$158, 000, 000 Taxes, state and
50-99 over 100 Number of cities with plants	36 19 102	local 1 \$2, 000, 000–\$2, 500, 000

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, UTAH, 1970

Soft drink sales produced by Utah bottlers totaled an estimated \$19 million in 1970. The bottlers employed 652 persons and had a payroll of \$3.5 million. There were 25 bottling plants in the state in 1970. Most were small; 14 plants employed less than 20 persons each and nine between 20 and 50 persons each. The plants were located in 13 cities throughout the state. The bottlers purchased goods and services from other firms totaling an estimated \$9 million. They paid taxes estimated at between \$175,000 to \$225,000, excluding land and sales taxes.

### Utah soft drink manufacturers

Single-plant firms 25 Multiplant firms 4 Domestic ownership 21 Plants by number of employees	Payroll
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<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, VERMONT, 1970

Sales of soft drinks produced by Vermont bottlers totaled an estimated \$6 million. The bottlers employed over 160 persons and had a payroll of approximately \$1 million. There were 10 plants located in the state in 1970. Almost all were small, employing less than 20 persons. The bottlers purchased goods and services from other firms valued at approximately \$3.6 million. They paid taxes, excluding land and sales taxes, of close to \$100,000.

### Vermont soft drink manufacturers

Number of frams	Number of employees       160         (average)       56, 200, 000         Sales—wholesale       \$6, 200, 000         Cost of materials       \$3, 600, 000         Value added       \$2, 600, 000         Taxes, State, and       \$75, 000-\$100, 000
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<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### Virginia soft drink manufacturers

Sales of soft drinks produced by Virginia bottlers totaled an estimated \$119 million in 1970. The bottlers employed 4.136 persons in 1970 with a payroll of \$24 million. There were 65 plants in the state in 1970; most were small, employing less than 50 persons each. The plants were located in 34 cities throughout the state. The bottlers purchased goods and services from other firms totaling an estimated \$60 million. Taxes paid, excluding land and sales taxes, are estimated at between \$1.5 million to \$2 million.

### Virginia Soft Drink Manufacturers

Number of firms	65 27 20 37	Payroll \$24,000,000  Number of employees (average) 4,136  Sales—wholesale \$119,000,000  Cost of materials \$60,000,000  Value added \$59,000,000  Taxes, State, and local \$1,500,000-\$2,000,000
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<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, WASHINGTON, 1970

Bottler's sales in Washington topped an estimated \$62 million in 1970. The bottlers employed close to 1.400 people with a payroll of over \$10 million. Some eight out of ten plants were small, employing less than 50 people; only three plants employed more than 100 persons. There were 35 producing plants in 1970 located in 18 cities throughout the state. The industry in the state purchased an estimated \$33 million in materials and services from other firms mainly in Washington in 1970. In total, the bottlers paid close to \$1 million in local and state taxes.

### Washington soft drink manufacturers

Washingtone my Caronia and S	
Number of firms       31       Payroll       \$10         Number of plants       26       Number of employees       \$1         Single-plant firms       26       \$1       \$26         Multiplant firms       5       \$28       \$3         Domestic ownership       29       \$29         Plants by number of employees:       28       \$20         1-49       28         50-90       4       \$4         Over 100       3         Number of cities with plants       18	1, 359, 000 2, 000, 000 3, 000, 000 9, 000, 000

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, WEST VIRGINIA, 1970

Soft drink sales of West Virginia bottlers totaled an estimated \$38 million in 1970. The bottlers employed 1,552 persons and had a payroll of over \$8 million. Employment and payroll of the bottlers exceeded that of all other beverage producers, and major categories of the processed food, textile, apparel and most capital goods companies. There were 51 plants in the state in 1970. Almost all were small; 43 employed less than 20 persons each. The plants were located in 26 cities throughout the state. The bottlers purchased goods and services from other firms valued at \$19 million. They paid taxes, excluding land and sales taxes, at over \$375,000.

### West Virginia soft drink manufacturers

Number of firms 4	6	Payroll	\$8, 400, 000
Number of plants 5	1	Number of employees	. , ., .,
Single-plant firms 3	7	(average)	1, 552
Multiplant firms	9	Sales, wholesale	\$38, 000, 000
Domestic ownership 4:	2	Cost of materials	\$19,000,000
Plants by number of employees:		Value added	\$19,000,000
1-49 4:	3	Taxes, State and	, , , , , , , , , , , , , , , , , , , ,
50-99	7	local 1 \$375, (	000-8450, 000
Over 100	1		7-201000
Number of cities with plants 26			

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, WISCONSIN, 1970

Soft drink sales of Wisconsin bottlers totaled an estimated \$85 million in 1970. The bottlers employed over 2,600 persons and had a payroll exceeding \$17 million. Employment and payroll of the bottlers exceeded that of many key sectors of the food processing industry as well as that of the textile, saw mill, chemicals and metal fabricating industry sub-groups. The plants were located in 72 cities throughout the state. The bottlers bought goods and services from other firms estimated at \$41 million. They paid taxes, excluding land and sales taxes, of close to \$1 million.

### Wisconsin soft drink manufacturers

Number of firms	102	Payroll \$17,000,000
Number of plants	111	Number of employees
Single-plant firms	86	(average) 2,649
Multiplant firms	16	Sales, wholesale \$85,000,000
Domestic ownership	95	Cost of materials \$41,000,000
Plants by number of employees:		Value added \$44,000,000
1-49	96	Taxes, State and local 1 \$1,000,000
50-99	10	7
Over 100	5	
Number of cities with plants	72	

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

### SOFT DRINK INDUSTRY PROFILE, WYOMING, 1970

Sales of soft drinks produced by Wyoming bottlers totaled an estimated \$7 million in 1970. They employed 120 persons with a payroll of \$660,000. Employment and payroll of the bottlers exceeded that of several industry sectors including categories of the meat, printing and apparel industries. There were ten plants in the state in 1970; all were small with nine employing 20 persons or less. The bottlers purchased goods and services from other firms estimated at over \$3 million. They paid taxes, excluding land and sales taxes, of close to \$100,000.

### Wyoming soft drink manufacturers

Number of firms	9	Payroll	\$660,000
Number of plants	10	Number of employees	,
Single-plant firms	8	(average)	120
Multiplant firms	1	Sales, wholesale	\$7,000,000
Domestic ownership	9	Cost of materials	\$3,000,000
Plants by number of employees:		Value added	\$4,000,000
1 49	10	Taxes, State and	
50-99	0	local 1 \$75	, 000-\$125, 000
Over 100	0	·	
Number of cities with plants	6		

<sup>&</sup>lt;sup>1</sup> Excludes land and sales taxes.

Senator Hart. Our next witness is Mr. Pope Foster of the Coca-Cola Bottling Co. of California.

Mr. Foster?

STATEMENT OF W. POPE FOSTER, PRESIDENT AND GENERAL MANAGER OF THE COCA-COLA BOTTLING CO. OF TAFT, CALIF., ACCOMPANIED BY RALPH BRAUNSTEIN, COUNSEL

Mr. Foster. Mr. Chairman, I am Pope Foster. I would like to in-

troduce my attorney, Mr. Ralph Braunstein.

I am president and general manager of the Coca-Cola Bottling Co., in Taft; and I am here to say today that you are being asked to exempt from antitrust laws restrictions which would divide markets, assign customers to particular suppliers, promote monopolies, and guarantee

high prices to the ultimate consumer.

This legislation is being presented underneath the banner of the small bottler. This is simply not the case. It is not the small bottler that wants this protection from the restrictions, it is the large bottler. He has to have them for two very specific purposes; the first being that the large bottler wants to keep the small bottler out of or from invading his territory.

The small bottlers are all trained men who know their business, and if they are able to invade the large bottler's territory, then it will

create competition and it will disrupt his price structure.

Also, these restrictions will keep the small bottler small—dried up, if I may say in my country way—until the large man can take him

over.

I think another thing that should be considered—it has been said before—we should go back into history, into the forming of the franchises. It was started some 70 years ago, and in that period of time, in those days, the restrictions were no big thing. It was an infant industry that was just starting.

It took very little money to get into it. I think that has been pointed out here today. Restrictions were only a part of your franchise. All you really needed to do was to get it in a bottle somehow, get it on a

mule and wagon, and go out and sell it.

You became little investors in your own little protected area. I am not taking off on these gentlemen at all. It was a great industry, and they have done a wonderful job. But that was 70 years ago. That is like asking you to take an engine out of a Piper Cub and put it into a 747 jet. It just does not apply to today's conditions.

Now, we have had a migration in population, and this has brought about two types of Coca-Cola bottlers. It has brought about the large bottler, centralized in the large metropolitan areas, and the small

bottler.

Now, the large bottler operates on a large industrial base. In order to meet all the requirements and the investment in sophisticated equipment and machinery that is needed by this industry, he has the resources from which to draw.

The small bottler, he is compelled to meet these same standards in approved manufacturing plants. His industrial base is very small. Con-

sequently, financing this has become quite a problem.

I know because I am a small bottler. I have fought these problems,

and I beat my head against the wall.

I beat my head against the wall as to what to do. And then one day, suddenly, with God's help, a large customer moved into town, located in Taft territory, and gave me the order for Coca-Cola, the income from which would enable me to make the investment in everything that I needed for my territory.

I thought my day had come. I was ready to play ball with anybody—the big boys or anyone else. Then suddenly the rug was pulled out from underneath me. I felt like the young fellow on a little league team that is all ready with his ball and bat, and the umpire set him on the bench.

I could not understand this sitting on the bench. I had everything I

needed, and yet they told me I could not play in their ball game.

Maybe at this point I should bring up warehouses. They have been mentioned before here. We have them in California, and they are usually located in the larger metropolitan areas. I, myself, class ware-

houses in two categories.

There is a private warehouse, such as Safeway and the national chains, that assemble commodities and send them out to the stores, their own private chain stores. They purchase this Coca-Cola from the producer in that area, and once they have purchased it, it is their product and they legally can do anything they want to do with it and they send it out to their stores.

Then there is the other type, the cooperative warehouse, to duplicate these functions. They also purchase Coca-Cola, and exercising the free

enterprise system, send it out to his customers in turn.

Now, these warehouses do a very, very good job. They advertise in Taft, Calif. I have just one of the order books. It just happens to be from Orange Empire. And as the customer—my customers in a large percentage of the stores in Taft—is compiling his grocery order, there are Coca-Cola products in there that he can order. He can just check them off. They will be sent up on the next truck.

I may say that I am one of four companies selling Coca-Cola in the Taft territory. I am the only producer. The others are these ware-

houses that I have referred to.

If you will bear with me for a moment, I will go back to my

testimony.

It was going to solve all my problems. I had this big order, and I phoned in the order to Canners for Coca-Cola in San Leandro, Calif., which is a subsidiary of the Coca-Cola Co.

We have a contract with them where they produce our cans for us. Shortly after I phoned in the order I was informed by the officials of the Coca-Cola Co., that they would not fill the order, they would not knowingly assist me in crossing franchise lines, even though they had known for some years the large metropolitan areas and been shipping Coca-Cola up into the Taft area.

Evidently, the road only ran one way. I had the warehouses in Taft, and I could not supply them with the product. But, at the same time, the man in the metropolitan area of Los Angeles had no trouble supplying his warehouses. So the road evidently runs one-way. It runs into

Taft, and not out of Taft.

In endeavoring to stop me from supplying my warehouse, Coca-Cola came up with a dilly. They called it a syrup quota. They placed me on a 150-percent quota of what I did in the year 1970.

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Now, 150 percent of what I did in 1970, due to my small volume, is practically nothing. I cannot supply my warehouses. That is one way to cut it off. And I understand that they have put similar syrup restric-

tions on other small Coca-Cola bottlers in California.

But if Los Angeles has a 50-percent increase in the amount of svrup—I do not know whether they are rationed or not, but just say if they do have a 50-percent increase—that would amount to millions of gallons of syrup. It would be enough to take over the entire southern California, I believe. I do not have the statistics. I have to rely on what I think is true. I have no staff or anything like that.

But I believe they could take over the entire area of southern

California.

Now, I may say something about these production centers. Coca-Cole I understand—I have heard it discussed here today, a lot about production centers: I know very little about them, but I have my own thoughts on them and I would like to express them.

If Coca-Cola—we will say for this argument—take 100 Coca-Cola plants and consolidate them into one production center, three things

would happen.

The first is Coca-Cola, I presume, has eliminated 99 producers. And in a free enterprise system, if you cannot produce, you cannot compete. I fail to see exactly what this would do for the small bottler. He is still confined to his small area. He still cannot expand his business, and he still has to get every dime out of every bottle of Coke he possibly can.

Now, for my own self. I would rather depend on the free enterprise system, rather than join a production center. I would much rather sell a million cases of Coke at a reduced price than a lesser number at a

fat price with all the restrictions that come with it.

I have another little country phrase, if you gentlemen will excuse me. I am not polished up for this. I more or less have called it "who gets what and why.'

If the FTC is entitled, they can go ahead and enforce the laws that are on the books today, then the eliminations would come by the free

enterprise system, which in my opinion it should be.

If you gentlemen restrict the FTC from carrying on their job, then the picking of this would come by the Coca-Cola Co. They can pick and choose their own friends. And I know from myself-speaking of production centers—I was in Atlanta, Ga., in the office of Mr. Lucian Smith, president of Coca-Cola Co.

He stated that they have a man on the wall with 78 production cen-

ters. That is what they want it to be.

Well, that is nice. But I think that we have—it has been mentioned here today—I don't know the exact number—800 men trained in the beverage business. I think if you allow the free enterprise system to operate among these 800 men, we will certainly increase that number from 78 to 79 or a greater number than that, underneath the free enterprise system.

All I am really saying to you today, gentlemen, is, "Do not turn

over this magnificent industry into the hands of a few."

Let this little dispute be settled by the free enterprise system.

There is a saying—the man said, when he was fighting the bear, "Good Lord, if you are not going to help me, please do not help that bear."

Thank you, gentlemen.

Senator Harr. You are very interesting and a thought-provoking witness, and it does occasionally run through the hearing room whereever this committee is sitting that a great many most vigorous proponents of the free enterprise system encourage the Government to stay out of their business.

Sometimes they are asking for the right to act as private governments. That is really what you are up against, when the plea is made, "Let us carve out such empires as we elect. Don't you get into it."

Really, it is the theory of the competitive system, there is an obligation on Government's part to prohibit private governments setting

up ground rules and inhibiting the flow of the system.

I use words that are critical of those who would ask the right to be protected against the forces of competition. It is an understandable request. In isolated cases, I am sure the public interest can be said to be served by permitting that kind of restraint on competition.

I think an earlier witness was asked: What about the situation in Los Angeles, the small bottler, where territorial exclusivity is per-

mitted? He will not be able to go into the Los Angeles market.

The reply in substance was: No small bottler will ever be able to try to get into Los Angeles.

You say you do not agree with that.

Mr. Foster, I do not agree with it, sir, because there is such a thing in California called the "backhaul" system. The warehouses I referred to run their merchandise out into all parts of the State, and they backhaul back into it.

Now, if they are allowed to stop by Taft, Calif., I have two warehouses there, and go back to Los Angeles, I pay them 10 cents a case for transportation. That is a 10-cent rebate to the man that runs the

truck, and I may add in one other little thing now.

Also, the warehouse—talking about moving into small towns—have to have a number of employees operate that warehouse, to load those trucks, and break these orders down.

But I firmly believe that the little man, utilizing the backhaul situation, can invade a larger market. He is a competent producer. Excuse the country-boy phrase, but he is used to living on beans.
I know I can do it. If it whips me, it is my own fault. But I don't

want my hands tied.

May I—not only did I lose my place in my notes, but I forgot to ask you to enter these in the record.

May I do that at this time?

Senator Hart. Yes, we will put them in.

(The document follows. Testimony resumes on p. 112.)

STATEMENT OF W. POPE FOSTER BEFORE THE SENATE SUBCOMMITTEE ON ANTIRUST AND MONOPOLY, AUGUST S. 1972

My name is Pope Foster.

I am the president and general manager of the Coca-Cola Bottling Company of Taft, California, I have been a Coca-Cola bottler for thirty-five years, all my working life, and operate the business that was my father's before me.

I am a small businessman -in fact, very smail. The population of the area I

am presently limited to serving is about 20,000.

I have no staff of economists or marketing experts, and no industry association or syrup company has assisted me in preparing my testimony. I have no statistics. but I know the small bottler is in trouble in my industry, not because the Federal

Trade Commission threatens the old system of exclusive territories, but because the syrup companies and large bottlers want to pressure him out of existence.

What I have to say is based on my own experience, on my own direct knowledge of my business, and not on theory or speculation, not on rumors or on fears inspired by the propaganda of the large bottlers and syrup companies who dominate the soft drink industry, or by the self-perceived interests of the officials of the industry associations.

You are being asked to pass legislation to exempt from the anti-trust laws a system of territorial restrictions whose effect is to divide markets, assign customers to particular suppliers, prevent competition among bottlers of the same brand of drink, promote monopolies for the benefit of bottlers of a given brand, make monopoly profits for the big bottler, and guarantee artificially

high prices to the consumer.

This legislation is being promoted by large forces in the soft drink industry under banner of the small bottler. They say it must be passed to enable the small businessman to survive. They have made every effort to persuade the small bottler that this is so. Those who have not been persuaded have been subjected to subtle threats of franchise cancellation in order to muffle their opposition to

this legislation.

I am here to tell you that legislation of this kind is not only unnecessary to survival of the small bottler but that the territorial restrictions it would legalize are themselves violations of the Antitrust laws and right now are a major obstacle to his continued existence. With the changes now taking place in soft drink manufacturing, marketing and distribution, territorial restrictions are already making survival of the small bottler an impossibility. Unless he can grow larger, the small bottler has no choice but to sell out to someone who already has the resources to meet the demands of these changes. But, the tyranny of exclusive territories limits the small bottler's growth by preventing him from seeking customers outside of a limited area, which is often inadequate to support the volume he requires to continue operating his business.

My own situation typifies the problems of the small bottler. Although my problems may be more acute than those of some others because my business is so small, they are the same problems and differ only by degree. There have been chauges in packaging, rising costs of materials and labor, and the need to comply with modern standards for the production of food products. All of these changes have meant one thing: increasing sophistication in plant and equipment is re-

quired to deal with them.

But, with sales confined to satisfying consumers in my restricted territory. where there is a small, stable population and a well-developed per capita demand, I have no significant opportunity for growth. Without growth, without access to a larger market, my business lacks the profit potential necessary to finance the new plant and equipment I must have to survive. Unless I can grow. I can't adapt to changing production and marketing methods. And if I don't

grow and can't change, I can't stay in the business at all.

Because I am one of the smallest bottlers in the country, I may feel these pressures earlier and more sharply than others, but they affect every independent bottler in the small business category. While I don't have access to the industry statistics. I have only to look around me and read the trade papers to see that the small bottlers are disappearing rapidly, merging into larger units. And this is happening before they have ever been deprived of the so-called protection of exclusive territories. It doesn't take much to see that legislation permitting exclusive territories to continue will not stop the trend that has been going on for several years while exclusive territories are still the rule.

The changes occurring in marketing and distribution patterns were brought home to me when I realized that the territorial restrictions which were supposed to protect me from competition with other Coca-Cola bottlers were only partially effective. Coca-Cola supplied by other bottlers was appearing in my territory,

shipped in not by the bottlers but by their customers.

The major outlet in Taft is one national chain supermarket. There are three medium size local markets, some mom-and-pop groceries, plus the liquor stores, and some other small outlets. In Taft, you either make it in that chain supermarket or you don't make it at all. Over the years, we have slowly been losing portions of even that business. At any point in time, up to 30 percent of the Coca-Cola products in that supermarket are in packages which we aren't producing or offering.

These are being shipped from the greater Los Angeles area. Here's how it

started:

About ten years ago, we-along with other small bottlers in the southern part of the state—signed an agreement with Los Angeles Coca-Cola and The Coca-Cola Company allowing Los Angeles to sell to grocery warehouses who shipped into our territories. In return, we were told that we would be reimbursed 10 cents a case, less accounting costs, for the product shipped in.

As time passed, most of the small bottlers in this area were purchased by

the larger plants and the adjoining territories were merged.

In 1967, shortly after the Supreme Court in the Schwinn case declared territorial restrictions illegal per se, we received another letter from Los Angeles Coca-Cola telling us that they were terminating the agreement to pay the 10 cents per case on the advice of their counsel because of "development in the Anti-Trust laws". They stopped the payments, but they didn't stop the shipments.

I thought about trying to sell my product into the Los Angeles territory but, frankly, was not equipped to enter that market on my own. And, I was still basically oriented toward maintaining the "protection" of the exclusive ter-

ritory.

In mid-1970, I started getting visits from Coca-Cola field personnel and inspectors. I was told that my plant didn't and couldn't possibly meet current manufacturing and quality control standards. They didn't find anything wrong with my product-although there were occasional variations in mix and fill that resulted from my old equipment.

I was told that I had to make changes and additions to update the plant or

else shut down completely.

I told the company I was willing to make the equipment additions and that I wanted their technical assistance. I then received a letter from The Coca-Cola Company advising me that, based on current volume and profitability of the plant, the cost of the new building and equipment they required would literally put me out of business. They told me there was no alternative but to sell my franchise to either the Los Angeles or the Bakersfield Coca-Cola bottler.

Los Angeles was not interested at all and the offer from Bakersfield was unfairly low as far as I was concerned. I felt that an effort was being made to force me out of business by leaving me no choice but to sell cheaply to a single

preselected buyer.

In December of 1970, the pressure was so great that I had to make a decision

either to sell out cheaply or simply close the doors for good.

Just at this time, Tom Heckenkamp and Don MacFarlen contacted me as a possible supplier for their new company, TOMAC, a food distribution firm.

These two men had just formed the business and were looking over the pricing structure of some of the products being sold to the L.A. grocery chain and cooperative warehouses. They decided that soft drinks would be an ideal product for their business. Why did they come to me instead of the larger plants down south? Well, one big reason was price. The chains were paying in the area of \$3.00 a case for canned Coke in L.A., and they were looking for a cheaper price.

I knew that my franchise prohibited me from selling Coke outside my exclusive territory. I also know that the Los Angeles bottler sold Coke to the warehouses in his territory who in turn sold it to their customers in my territory. Since my franchise is the same as the Los Angeles bottler's, I decided to do just what he was doing. After all, I figured, that road has to run both ways. To make a long story short, TOMAC set up a warehouse in Taft and placed an order with me for delivery of about 50,000 cases a week. I gave them a price

below the Los Angeles bottler's price, but one that still made a good profit for me.

I can buy the cans from San Leandro (a parent company-owned canning facility near San Francisco) for \$1.96 per case, delivered in Taft. At my price to TOMAC, I could make money and TOMAC could deliver the product in Los Angeles at a price considerably cheaper than what the local producer was charging. The cash flow from the cans would let me finance the new plant so that I could survive, and with new customers I could grow in the business that has been my life.

So, in January of 1971, I placed my first order for 50,000 cases of canned Coke. I phoned the order to San Leandro and then followed it up with a confirming

letter.

I was told by the young lady who took the order that she would have to check it out, that the order was larger than any I had ever placed and that the Atlanta headquarters of The Coca-Cola Company would have to be contacted.

They were contacted, all right, and it wasn't long before I was told that

the order wouldn't be filled!

The reason? Company Officials told me that they would not knowingly be a party to the shipment of product across franchise lines and from all indica-

tions that was just what I was preparing to do with it.

They were right, of course, that the product was going to be shipped out of my territory, but it was my customer who was doing that. I was only doing what the Los Angeles bottler had been doing for years. I wanted to know why the big boy could do it and why I couldn't. My customers wanted to know why a warehouse in Los Angeles could buy Coke and ship it where they chose, but their warehouse in Taft couldn't do the same thing. I had assumed the road ran both ways, but the syrup company was telling me it was a one-way street with me at the losing end. I decided to see a lawyer.

As soon as my lawyers contacted The Coca-Cola Company, I began to receive phone calls and visits from officials of the Coke bottlers association, from other neighboring bottlers and even from a distant cousin I haven't heard from in 25-years, who is a large Coke bottler back in Alabama.

All of them told me basically the same thing: "Don't rock the boat, you're going to ruin it for all of us," or "What are you doing? You're disgracing the family name". The pressure was heavy but I resisted. After all, none of them suggested they would help solve my problems—they only wanted to stop me from upsetting their own apple carts.

Meanwhile, I tried to arrange for a contract packer to handle my production while my line was down and my new, modern plant was being built. Coke would only approve production by another Coke bottler. Not surprising, those suggested quoted exhorbitant prices—so high that there was no way I

could use them and continue my business.

Finally, I found a nearby independent packer with a large new plant who

really wanted the business and quoted realistic prices.

After many delays, Coke decided his plant met all quality control standards, and approved the arrangement. At this point, the Los Angeles bottler threatened to sue the packer, who withdrew because he couldn't afford a costly legal battle.

Along about this time, I started receiving visits from the State Health Department. These inspectors hadn't been to Taft in many years, and maybe it was just a coincidence that they suddenly began making trips to Taft to inspect my plant, turn around an leave town again.

It seemed that if I didn't go out of business voluntarily, every means pos-

sible was going to be used to force me to close down or sellout.

Meanwhile, my attorneys were visiting supermarkets as part of the preparation of a lawsuit against the Coca-Cola Company, soliciting affidavits from buyers and chain executives.

When they visited Thriftimart, they were taken directly to the President,

Robert A. Laverty. He indicated a willingness to assist us in the case.

As a result, he eventually purchased 51 percent of my stock in Taft Coca-Cola Bottling Co. The board of directors stays the same and I'm still president and general manager.

Laverty's purchase helped me out of the personal financial crunch into which had been driven, and with a strong partner, I was in a position to make the plant improvements the company was demanding and to defeat the pressure to

sell out or fold up completely.

Now that I have the ability to increase my production to serve large new customers, the Coca-Cola Company has rationed my syrup supply. I am allowed 150% of what I used in 1970, on a month-by-month basis. Because of my small size, the 50% increase over 1970 doesn't allow me to expand my business enough to serve warehouses or other large quantity customers in my territory. I have been told that the other Coke bottlers are on a similar ration, but the impact is only felt by the little fellows like myself,  $\Lambda$  50% increase means nothing to me because my volume in 1970 was so small—about 7000 gallons of syrup. But a 50% increase for the Los Angeles bottler probably means more than a million gallons of syrup so that, practically, there is no limit on him at all. With that kind of increase, he could completely take over the market for Coca-Cola in Southern California, Yet the Coca-Cola Company says it is treating all bottlers alike by putting the same limit on all of them.

Representatives of Coca-Cola tell me they can't stop Los Angeles or anyone else from selling to the warehouses who ship into my territory. Well, they have stopped me from doing the same thing. Their actions hold me and other small bottlers back, but they allow the giants to ignore the franchise lines. They don't

let me sell to warehouses but they do nothing to stop the big bottlers.

This is nothing more than telling me what customers I can and cannot serve even when the customer is in my own territory or is willing to come there to buy from me. And it is also telling the customers who they must buy their Coke from.

When I realized this, I realized that the territorial restrictions weren't protecting the small bottlers against possible invasion of their markets by the big ones, as the industry propaganda had always said. It is just the opposite. The exclusive territory is just being used to keep the little bottler from invading the larger markets. It keeps the little man in his place, keeps him from growing by competing successfully with the big bottlers where the action is—in the large markets.

Right now, the retailers in Los Angeles are being forced to buy virtually all their Coke from the L.A. bottler. Because of the syrup quotas applied to enforce the territorial restrictions, they can't even buy it elsewhere and bring it back to their warehouses in L.A. on their own trucks. There is no price competition for the L.A. Coke bottler, and no "service" competition either. He sells on his own terms and the customer has to take it or leave it—if he wants to deal in Coca-Cola.

It is understandable that the retailers would like to buy from me as well as from L.A. Coke. Competition will bring the price down and give them better service. They have a real interest in seeing that I have enough business to sustain an efficient and up-to-date bottling plant. With their business, I can grow enough to survive as a small independent businessman.

And if Los Angeles Coke wants to compete with me in Taft? I can handle that. They already do compete with me, through the Los Angeles warehouses which sell to stores in my territory. But even if they didn't, the opportunity to compete in the L.A. market is worth far more to me than a monopoly in Taft would be.

Any legislation that allows the territorial restrictions on soft drink bottlers to continue will leave me exposed to rapidly changing technology and markets without the means to meet these changes. To meet them requires that my business expand and grow. The only way I can grow large enough and rapidly enough to survive is to compete in a larger market. Any continuation of exclusive territories will put me out of business, and the larger bottler who surrounds me will be the one to benefit. His potential competitor—me—will be eliminated, and he will be in a position to expand into my territory when I'm gone.

In short, this legislation is not for the protection or benefit of the small bottler. The principal beneficiaries will be those who already sit on the large urban markets but who have smaller bottlers surviving nearby with the potential to compete if the barriers fall. The big bottlers want and need the restrictions to keep the little man out—to keep him small until changing business conditions make the little man ready to sell. At that point, the big bottler will buy the smaller at a low price reflecting the denied opportunity for growth, eliminate threat of potential competition, and add to the size of his own monopoly position.

Mr. Lucian Smith, president of Coca Cola USA, told me and Mr. Laverty in his office in Atlanta that the company planned to consolidate bottling operations into 78 production centers. And yet he supports this legislation which is supposed to benefit the smaller bottler. It is hard to see how the plan to consolidate small bottlers into larger units requires exclusive territories to save the small bottlers who are to be consolidated. The little man doesn't need this legislation—he needs to be protected from the kind of friends who want to avoid competition from the little man while they run him out of business on their own schedule.

It seems to me that the real question is not whether small bottlers can survive. The answer to that is that many of them won't because changing markets and technology require them to be larger if they are to continue.

The real question is whether those who survive are to be hand picked according to plans of the syrup companies, or whether they are to be selected by the forces of competition unaffected by restrictions which the Supreme Court has declared violate the antitrust laws. I know that 78 production centers doesn't leave any room for small independent bottlers. But if I am freed of these territorial shackles, I can grow large enough to continue—perhaps to make the number 79 instead of 78. And if the other small bottlers recognize this in time, the number of small independent businessmen who stay in the bottling business will make that total quite a bit larger than 79. That is what my opposition to these restraints on competition is all about.

Thank you.

Coca-Cola Bottling Co. of Los Angeles, Los Angeles, Calif., June 19, 1968.

Mr. Pope Foster, Coca-Cola Bottling Co. of Taft, Taft, Calif.

DEAR MR. FOSTER: You are certainly familiar with the pros and cons regarding the trans-shipment of Coca-Cola cans by customers purchasing them in one area and trans-shipping them to another. This has had much discussion by bottlers and has been going on for some time.

The entire subject has had increased dialogue, particularly in recent months, and has caused our company to re-examine the entire subject to help determine the proper course under the circumstances now prevailing. This study included

a current opinion by our legal counsel. In following their advice:

We are by this letter hereby tendering written notice of the termination of the letter agreement dated June 11, 1960, which relates to the resale in your franchise area of Coca-Cola in cans purchased by our customers in our franchise area. We have been advised by our legal counsel that recent developments in the field of antitrust law require this course of action.

Such termination to be effective July 1, 1968.

We have appreciated your cooperation in the past and we trust that we have made it clear and that you will understand our company's position in taking this course of action.

Very truly yours,

A. D. MACDONALD.

Senator Hart. Mr. Bangert?

Mr. Bangert. Mr. Foster, on the first page of your statement, you indicate that you serve a population of about 20,000 people.

Would you tell me how many cases per year production this repre-

sents?

Mr. Foster. We do not have on the west coast the high per capita consumption as they do in the Deep South. Their per capita consumption is out of this world. I hope someday the west coast will attain it, but it is about 32,000 cases.

Mr. Bangert. Now, Coca-Cola apparently believes, according to their bottlers consolidation department, that a minimum profitable

production operation is 1 million cases per year.

Contrasting this figure with the territory in which you are confined, what chance do you think you have to grow larger, more efficient, and

thereby survive?

Mr. Foster. Without the franchise lines, which are being crossed today in my direction, I believe through backhaul—I may interject here that the grocery stores and different customers in Los Angeles have a real interest to see that I stay in business to bring competition into this industry.

I believe that I could generate enough business in a free enterprise system which would derive capital whereby I could further develop

my own little territory there in Taft, Calif.

Yes, I think—I know it can be done. And I am not the only one. I mean, this industry has 800 qualified bottlers. The only difference between bottlers is how large his base is, that is all. We have to manufacture the same product, the same bottle of Coke.

Mr. Bangert. In your statement you talk about subtle threats of franchise cancellation in order to muffle opposition of the small bottler

to this legislation.

Now, we have heard this before, frankly, and I do not think we are sure how it works, because our understanding is that Coca-Cola franchises are perpetuity. Could you explain this a little further?

Mr. Foster. The only written evidence that I have—and I am not

an attorney, but I did not receive a copy of this.

A letter was put out, which I understand is called the Taft letter. And we went to court here about 2 months ago and asked for a temporary injunction. The first part of the letter explained the legal procedures we went through in asking for the temporary injunction.

The last page stated that if the FTC had its way or if I won the injunction, that there would be a question in the mind whether or not my entire franchise would be illegal, since one part of the contract would be declared illegal. There would be a question in their minds as to whether I had a contract or not.

Now, I am not a lawyer. I cannot interpret that. I am a Coca-Cola bottler.

When I finally got a copy of it and read it, that shocked me a little. If I was another bottler—and I may have the wrong interpretation on the darned thing—but that is what it said. It would not have bothered me so much—you said "threat"—it didn't say all bottlers. They had Taft, Calif., in there. I am the one scratching their back.

Does that answer your question, sir?

Mr. Bangert. Yes.

With the chairman's permission, perhaps we could put that document in the record.

Senator Hart. Yes.

(The document follows:)

COCA-COLA U.S.A., Atlanta, Ga., June 23, 1972.

In the interest of keeping you well informed and to be certain that you receive correct information directly from us, I would like to bring you up to date on the Taft litigation. As you know the suit asks for damages and injunctive relief because of our refusal, on the basis of the terms in paragraph 1 of the contract, to sell Taft more syrup than needed to meet the consumer demands in the Taft territory.

On May 13, 1972, the Taft Bottler filed a Motion for Partial Summary Judgment asking for a declaration from the court that the territorial provisions of our contract are per se illegal. The Taft Bottler's request for a per se ruling in effect asks the court to decide the lawfulness of the territorial provisions without holding a full trial and without evaluating the reasonableness of the contract or the economic and competitive consequences of the contractual relationship between The Coca-Cola Company and the Taft Bottler. A Motion for Summary Judgment is normally decided by a judge on the basis of briefs, affidavits, and oral arguments presented to the court by counsel for the litigants. The Coca-Cola Company is filing its briefs on June 26, and oral arguments are presently scheduled for July 10.

The Taft Bottler's Motion for Summary Judgment asserts "that there is no genuine issue as to any material fact on the issue of liability and that plaintiff is entitled to a judgment on the issue of liability as a matter of law, because the territorial and consumer restraints which defendants imposed upon plaintiff are per se violations of Section 1 of the Sherman Act." The Taft Bottler relies on certain decisions of the courts which, it asserts, tend to support its position,

notably the Schwinn case and the more recent Topco decision.

The Coca-Cola Company intends to submit a vigorous defense of the Bottler contract and its territorial provisions which have been in force for more than 70 years and which were made part of a 1921 U.S. District Court decree. The Company will contend that neither the Schwinn decision nor the Topco decision is controlling, but rather that the "rule of reason" is to be applied in situations such

as ours which we believe to be unique.

The Company will emphasize, among other things, the reasonableness of the territorial provisions in the contract. We shall ask the court, as part of its consideration of the Bottler contract, to consider the history of how it came into being, why it is necessary both to the Bottlers and to The Coca-Cola Company, and the full implications of an adverse decision—bearing in mind that the Taft Bottler's contract is essentially the same as the contract of all other Coca-Cola Bottlers.

However, the position taken by the Taft Bottler in the lawsuit unavoidably focuses attention on the validity not only of the territorial provisions, but also of the Bottler's contract in its entirety. There is a longstanding and recognized principle of law that if a material and interrelated provision of a contract is found illegal, the contract as a whole is void and unenforceable. The territorial provisions are such integral parts of the Bottler's contract that there might be no basis for a contract with Taft if these territorial provisions were found invalid.

In view of the importance of this issue not only to the immediate controversy between the Taft Bottler and The Coca-Cola Company, but also potentially to the Bottlers of Coca-Cola and the Thomas Companies, we feel that we must raise the issue before the court in arguing that such a far-reaching question ought not be decided in any summary proceeding. Let me emphasize again that The Coca-Cola Company will continue to urge that the territorial provisions of the Bottler's con-

tract are plainly lawful.

The argument on the Motion for Summary Judgment is scheduled for July 10. There is no way to predict when a ruling might be made. Whatever the ruling may be, other issues will have to be litigated before any final judgment can be entered and before all appeals can be exhausted. Therefore, a final resolution of the

matter is still somewhat distant.

The Coca-Cola Company recognizes the importance of the strong business, contractual, and personal relationships between the Company and the Bottlers which have resulted in the unparalleled success of this business. For this reason, we are not only vigorous in our defense of the Taft Case but also we are strongly defending the Bottlers' and the Company's interests in the FTC Case and strongly support Bottlers' efforts for legislative action.

Very truly yours,

LUKE.

Mr. Bangert. There has been testimony—and there will be more—to the effect that if exclusive territories are prohibited, the smaller retail outfits now being served will be abandoned because large bottlers will raid the cream accounts, and the local bottlers will not be able to serve these smaller outlets.

But in your statement, you remind us that the distribution system can change and remain profitable and perhaps be dynamic. You indicate the small, independent grocery cooperatives are now in existence.

As I understand it, they are now in existence mainly because they had to meet the competition of the chainstores. I guess what I am driving at is: Do you see the possibility of new soft drink distribution systems coming into existence that would permit the smaller retailer to be served and not leave them abandoned?

Mr. Foster. Yes; if there are no franchise lines.

This, in my opinion, would open up opportunities to many small business shops. There is such a thing in California, they are called cash-and-carry stores. They can go to these stores and pick up their merchandise at a reduced price.

Now, my whole theme is we reduce the price to the ultimate con-

sumer. That is the idea.

There are vending companies now spreading out across the country that take a whole section of highways and service stations, and they

put their brands in.

If Coca-Cola was made available and you did not have to take it from a certain area and this competitive price existed, then I think many individual businesses would start up. And I think the little independent stores you are referring to now are all covered by what I termed earlier the cooperative warehouse. They are all members of that.

In Taft we are very small. But United Grocers and Orange Empire—this is an Orange Empire book—are after the business of those little stores. And some of them are no bigger than half this room.

Mr. Bangert. We have heard that intrabrand competition was not necessary because interbrand competition would control prices. Apparently in Los Angeles the chains were paying \$3 a case for canned Cokes, and you were able to sell to a distributor who could deliver in that area at \$2.70 a case.

So that in the instance where you could be in there, intrabrand com-

petition did provide quite a reduction in price.

Mr. Foster. It did. This was ultimately passed on to the consumer. Mr. Bangert. Yes. As you indicate in your statement, it was passed on to the consumer.

Mr. Foster. Yes.

Mr. Bangert. One of the things that has given us concern about the bills is the question of whether or not interbrand competition is viable, especially we are concerned about price competition.

What is your experience with regard to interbrand price competi-

tion? Is it vigorous?

Mr. Foster. The only type of competition you can really have, in my opinion, is the customers have preference due to advertising for either Pepsi-Cola or Coca-Cola. Where we really run into trouble is one man will give away machines or equipment, and that is the real competition we have.

Mr. Bangert. So it would seem this is a stabilized type of competi-

tion.

Mr. Foster. Yes. It just depends on who has the most money to give away the most equipment. They can buy stocks, as we call it in the beverage industry.

Mr. BANGERT. Have you ever in your history as a bottler attended

an association meeting where prices were discussed?

Mr. Foster. I have not attended one in several years, but I have. We discussed prices of the products and things like that.

Mr. Bangert. What were the purposes of these discussions?

Mr. Foster. The general feeling is: I cannot raise my price unless you raise your price. Then you arrive at a price that you all will go up to, usually within a week, something like that.

Mr. Bangert. Was this in the context of local bottler associations? Mr. Foster. This is in the context of associations. I was a member

of the county bottlers association.

Mr. Bangert. Are you under the impression these practices may occur elsewhere, besides Kern County?

Mr. Foster. I have no better proof, but I believe they will, yes. Mr. Bangert. I have no further questions, Mr. Chairman.

Senator Hart. Mr. Chumbris?

Mr. Chumbris. Thank you, Mr. Chairman.

Where is Taft located as a part of Los Angeles? In what direction? Mr. Foster. It is north of Los Angeles by 90 miles approximately. They built a new superhighway. It is 85 or 90 miles.

Mr. Chumbris. How many other bottlers are 90 miles away from

Los Angeles, or so, in different directions or the same direction?

Mr. Foster. Bakersfield is 40 miles from Taft. There would be a 15 or 18 mile difference in there. I cannot give you exactly what that is.

And going over toward Santa Maria, I think that is more than 90 miles. And Bishop, that is also further, I think. Taft and Bakersfield are the closest.

I may be wrong here. San Diego—I am guessing—that could be 150 miles. I do not know. It is roughly in that area.

I left out one, San Bernardino.

Mr. Chumbris. How long have you been in the bottling business?
Mr. Foster. My family has been in the bottling business 35 years.

I took it over from my father, who is 98 years old.

Mr. Chumbris. That is a good long life.

Mr. Foster. He has had a good long life. He is a good Coke man. It took him a long time to see what is happening. He does not see how the Coca-Cola Co. can differentiate between one bottler and another.

He is the old school. At one time we were a family—no matter what your size, if you were a Coca-Cola bottler, you were equal. Evidently,

that is no longer true.

Mr. Chumbris. Did there come a time when your operation changed either because of changing area, conditions, or fluctuations in population increasing in one city or decreasing in another, creating a problem

as far as you are concerned?

Mr. Foster. Yes. We are basically an oil area or were, and oil is a depleted commodity and they have fire flooded and a lot of things like that. Now oil is dying out and agriculture is coming in, because, as you have probably heard, we have the Feather River project coming down through the area. It is now changing from oil to agriculture.

We also have going in a large recreation area, one of the largest in

the State.

Mr. Chumbris. Has that affected you personally, the fact that your area changed from an oil area into another area? Have you shown a decrease in the population in Taft?

Mr. Foster. I have shown a decrease in population in Taft.

Mr. Chumbris. Do you think it has caused any change in the operation of your business?

Mr. Foster. No. I still have the same expenses. We still go out and

serve the customers. Industry is moving in at the same time.

I think my territory will eventually increase.

Mr. Chumbris. Are you still the sole owner of the business?

Mr. Foster. No. I sold 51 percent of the business.

Mr. Chumbris. Who took that over? Mr. Foster. A Mr. Robert Laverty.

Mr. Chumbris. What type of operation does he have?

Mr. Foster. I never met Mr. Laverty until July 1971. He owns a grocery chain. They call it Smart and Final. It is sort of like a warehouse. I am not too familiar with his business.

Mr. Chumbris. What I would like to know—your operation, the one you have now sold 51 percent interest, will your operation be similar

to his operation or will it continue as it has during the years?

Mr. Foster. It will be the same. Mr. Laverty is only a stockholder. I am president. He has made no suggestion to me whatsoever. He does have a warehouse located in Taft. He would like to do business with the Coca-Cola Bottling Co. in Taft.

I do not even have to sell him Coke unless I want to. He is a stock-holder. I was going broke, and according to the Coca-Cola franchise,

if you are declared a bankrupt, you lose your franchise.

I fought these people with my legal resources for several months.

What are you going to do? Throw up your hands?

Mr. Chumbris. Let me ask you about this. I think the main purpose of this bill is so no Coca-Cola bottler or Pepsi-Cola or Seven-Up

will be in a position of going broke, especially from competition of invasion of the franchisee in other areas.

That is the purpose of the bill.

Mr. Foster. Yes. But there has been a shift in population growth. In the metropolitan area, there is your base of wealth. Your bottler in the outside area has to comply with good manufacturing practices, which are quite expensive.

And the franchised territories prevent him from having an economic

base to do that.

If we have a free enterprise system, each man initiates his ability, and he can invade the other men. We will not call it invade. It is a free enterprise system, and he—we have a Dodge dealer in California. He gets on the T.V. at night and screams, "I will stand on my head until my ears turn red if you will come buy a Dodge from me."

That is the system that I think should be in the industry. Open it up. I will stand on my head until my ears turn red if you come get the Coke

from me.

I do not believe in telling the customer who to buy the Coke from. This is a free enterprise system. If I can turn flips—I have to stay in my little area—but if I can turn flips and get him to come buy that

Coke from me, I think that is my right.

Mr. Chumbris. I am looking at the bill S. 3133 as introduced. And I am looking at the States where the Senators are from that cosponsored the bill. I find Mississippi, Florida, Kentucky, Arkansas, North Carolina, Alabama, Colorado, Tennessee, Oklahoma, Utah, Texas, Nebraska, Kansas, Arizona, Wyoming, Oregon, South Carolina, Iowa, West Virginia, North Dakota, Alaska, and Georgia.

This indicates, looking at it real fast, it is the Southern area and West, far West. But the big States of California, Illinois, Michigan, New York are not included, although Texas is. But Texas is known as the great agricultural and cattle State, which goes to some of the testimony here, that these people show a concern of the small areas that

might be invaded by a big city within that particular State.

I was wondering if the fact that these Senators cosponsored the bill and Senators from the other States, who come from big States like New York and Illinois and California and Michigan, did not cosponsor the bill because it might be a little different problem in their State as against the States I just mentioned. It is one of two things.

Mr. Foster. I think you have overlooked the fact—you do not give

the individual bottlers the credit that they are due.

If several bottlers, uninhibited by restriction, got together and formed a production center on their own—the free enterprise system—that is wonderful. That is you and I and six others getting together and operating underneath the free enterprise system.

Now, some of those bottlers from the Deep South—I told you my father was 98 years old—are schooled in Coca-Cola. You have to be

schooled. I, myself. was schooled in Coca-Cola.

Anything that the Coca-Cola Co. said or did—if they told me the moon came up backwards, it came up backwards. That was just it.

And when this happened to me, I almost had a nervous breakdown.

I could not believe what was happening.

I think those bottlers, uninhibited by franchises, can group themselves together to settle this situation.

Mr. Chumbris. This bill did not come to the Senate beause Coca-Cola or Pepsi-Cola called up a Senator and said, "I want this bill

introduced."

This bill came here because a bottler in some small outlying area from the States I have mentioned contacted their Congressmen and contacted their Senators. "We are having a problem. We have been operating for 75 years under the system. The Supreme Court comes down with the Schwinn case and the Topco case and the other cases, each one a little bit different than the other."

They are worried that their business will be seriously affected, if there is intra-brand competition between one franchise dealer as

against the other. That is how this bill came before us.

When so many bottlers go to their respective members of Congress in so many States, there must be a problem there that has to be looked into. You cannot just write it off, and say whether we are going to have a national policy to enforce the antitrust laws or not, or whether we are going to be concerned about what happens to New York City. New York City may not have bothered to contact their Members of the Senate or the House from what I can see on this bill to say, "Look, help us out, because we need help."

It is the people that are represented by the these Senators who put

their name on this bill.

It is inconsistent with the experience that you have shown or the type of law that you would like to see or lack of law that you would like to see so you can get into a more aggressive program. That is why we have to get some testimony.

Mr. Foster. I don't blame New York.

But to get back—I think I mentioned my father is 98 years old and has been schooled in the Coca-Cola business. Anything and everything that Coca-Cola has said, he has never questioned it.

I received blank letters, where they told us more or less what to say and send in. I would guess that a lot of the bottlers got those letters.

What I am getting at here is, these gentlemen are not thinking—not that I am smart: I am just a dumb country boy—but they have not had a chance to analyze this. They have not been in the tiger's mouth such as I have.

I don't think any one put words in their mouth, but I do not think that they have analyzed it. I think they all write more or less similar

excuses

It is an orchestrated thing. I mean, anytime the Coca-Cola Co. would tell us to do anything, we would all go in that direction. It is only because I was in the tiger's mouth that I got an entirely different insight. For years I was petrified, like they are, that the big boys would take it over. And the big boy was taking it over.

But like I said in my simple way, the Good Lord provided me with two warehouses, and suddenly I saw that this road runs two ways in its benefits. Maybe these other fellows have not had this experience, but it exists. It exists in every—in the perimeter of every metropolitan area.

We only learn by experiences, sir.

Mr. Chumbris. In our colloquy there was a warning bell, so the Senator has just a few minutes to get to the floor.

I vield.

Thank you very much.

Senator HART. Any questions?

Thank you very much. Thank you. We will recess to catch that vote, and then we will resume. (A short recess was taken. Testimony resumes on p. 142.)

> COCA-COLA U.S.A., A DIVISION OF THE COCA-COLA CO... Pasadena, Calif., January 20, 1971.

MR. WILLIAM P. FOSTER, Coca-Cola Bottling Company of Taft, Taft, Calif.

Dear Mr. Foster: As you will recall, during our discussion in Taft, I told you that I would write to once again request that you reconsider your decision to construct a new bottling facility in Taft. Let me reiterate, this request is in no way an effort to disassociate you or your family from the business of bottling Coca-Cola, but rather a plea that a decision, devoid of emotion, and based on sound business judgment be made.

During my visit we discussed several facts upon which we agree. They are: (1) The present facility is no longer adequate for the production of Coca-Cola. (2) Taft population is approximately 17,000 people. (3) Present sales are approximately 23,000 cases. (4) Four employees are necessary to operate the plant. (5) An average wage of \$10,000 per year would be paid—per your estimate. (6) The cost of a new production facility would be approximately \$120,000.

There were other points on which we did not agree. Some of these are: (1) The future population growth of the Taft territory. (2) The feasibility of con-

tinued production in Taft.

It is upon the last two points which I would like to elaborate. I will agree that the release of land by the oil companies, and the coming of water from the north will be a great economic boon to the Taft area, but this will manifest itself primarily in the agricultural sector of the economy and, as you know, agricultural growth does not mean a growth in population. Now let's take a rather simplistic look at the economic features of constructing a new production facility. In the examples I do not take into account such factors as (1) taxes on property, (2) maintenance, (3) depreciation of coolers and fleet, (4) heat, lights and water, and (5) advertising. It is not necessary to consider these to demonstrate the futility of such an economic venture.

Very optimistic example:	
Salas 100 managet immers 40,000	6, 000
Depreciation on plant and new bottling equipment \$120,000/40	, 000
	000
	, 000
Interest on \$190.000 et 6.000	000
Interest on \$120,000 at 6 percent	,200
Dunck out (T	
Profit or (Loss)	. 200
More reasonable example:	
Sales—50 percent increase—35,000 cases20	. 250
	, 000
	, 000
Interest at C powerst	, 000
Interest at 6 percent	,200
Draft and Trans	
Profit or (Loss)	, 950

As you can see from the examples above, even the very optimistic approach nets a loss, and I strongly urge you to consider the alternative of selling the Taft operation and combine the monies therefrom with those you are willing to invest in a new plant and invest in a business which has a greater possibility

In response to your inquiry regarding temporary bottling, as I discussed with you, this can only be done by another bottler for Coca-Cola.

Enclosed are five copies of this letter. Would you please distribute them to all involved parties. Also, as I requested previously, before you make any financial commitments for construction would you please contact me in order that I may once again discuss the matter with you.

Kindest personal regards.

Sincerely.

THE COCA-COLA CO., Atlanta, Ga., July 11, 1972.

To all Members, Council of Coca-Cola Bottlers:

In January of next year, the 93rd Congress of the United States and most of the Legislatures in our country will convene and predictably we will again see bills introduced that would restrict your use of packaging, put special discriminatory taxes on your products, franchise bills and other legislative proposals which could make it more difficult for you to manage your business.

The time to state your case and present your facts and to obtain understanding

and sympathy of your position is not in January.

It is right now !!!!

All of us know that 1972 is an election year. All across the country new men and women are standing before the people to be selected as Representatives and Senators. Congressmen, Mayors and County Commissioners.

These people are in need of your help now. They need your active support. And in January they will remember who was there this summer. In short, it is time

to remember your old friends and to make new friends.

Two thousand years ago one of Athens' more astute citizens observed. "We do not say that a man who takes no interest in public affairs is a man who minds his own business. We say he has no business being here at all." This observation of Pericles is as appropriate and timely for modern American industry as it was for ancient Greece.

I call upon you to make sure your industry has friends at every level of government-in your city, your county, your State Capital and in your delegation

to Washington.

Nobody can handle that but you!

OVID DAVIS.

NATIONAL SOFT DRINK ASSOCIATION, Washington, D.C., February 17, 1972.

To: Key State Officials.

Subject: Territorial Legislation.

Gentlemen: First, since our mailing last week several states have called to determine the sponsorship by their specific delegation. To assist in that regard we are enclosing a tabulation showing the introduction or cosponsorship of bills by your Congressional delegation as of this date.

Second:

We are enclosing a press release by the Teamsters Union which endorses the industry's legislation. To many legislators this endorsement will be quite

Please examine your delegation listing for uncommitted Representatives or Senators who are interested, concerned or otherwise impressed by the attitudes of organized labor. Constituent-bottlers should put this release in the hands of those legislators, together with a repeated request for sponsorship of the legislation.

In some cases, the legislator may be more impressed if the union position is conveyed by the local Teamster official. If that is your assessment—and if the constituent-bottler is in a position to have it done that way-fine. In any event, the position of the union should only prelude another request for sponsorship or cosponsorship by the bottler.

There is still a fertile field of 315 legislators out there uncommitted. Good luck.

Best regards,

DWIGHT C. REED.

THE COCA-COLA BOTTLERS' ASSOCIATION. Atlanta, Ga., February 21, 1972.

To: All members.

The purpose of this letter is to remind the membership of the upcoming meeting of the Marketing Committee, to give a report of the Franchise Defense Fund, and to inform the membership that we here in the Association are available to the State Coca-Cola Bottlers' Association groups for an in person report on the current status of the FTC litigation and legislative effort.

The Association's Marketing Committee has scheduled its "input" session for May 1–2, 1972. The success of this committee depends upon the membership sending in its suggestions and comments for review of the committee and discussion with company officials. Your comments should be confined to the general subject of marketing including advertising, strategy, promotions, prestigious national accounts, etc. It is requested that your suggestions be sent in just as soon as possible so that an effective agenda for the meeting can be implemented with adequate preparation.

As for a status report on the Franchise Defense Fund, \$222,000,00 was collected as of December 31, 1971. Legal and other expenses in connection with the FTC matter and the legislative effort during 1971, were \$86,244,82. Of this amount, the Association itself paid \$45,461.59 (before the special fund was established); and the Franchise Defense Fund paid \$40,783,23. The unused monies in the fund earned .973 of 1% interest for the few months in 1971, they were held and invested; and 18,37% of the fund was expended during 1971. The above percentages applied to your own contribution may be useful to your tax attorney or accountant in preparing your tax returns and are furnished at the suggestion of the Association's counsel. The Franchise Defense Fund is held for the bottlers to be used in the FTC litigation and legislative effort as needed. Any unused funds will be returned to the bottlers.

Some of you may perhaps be interested in getting a first hand report to your state bottler group on the status of the FTC proceedings and the legislative effort from the point of view of bottlers of Coca-Cola. Things are moving so fast that it is most difficult to keep the membership abreast through written reports on these two vital subjects. If you are planning a meeting of your state group and would like a status report; please give me a call, and I will be delighted to come to your meeting unless, of course, it conflicts with any of the pre-hearing conferences or meetings scheduled in Washington.

With best regards, I remain Sincerely,

JOHN S. KNOX, Jr.

NATIONAL SOFT DRINK ASSOCIATION, Washington, D.C., February 10, 1972.

To: All industry members.

Subject: Status Report on Franchising Legislation.

It is good to be able to tell you that the industry program to secure Congressional support for special franchising legislation continues to make progress.

On January 14 we advised that 15 members of the Senate and 50 members of the House had agreed to sponsor or co-sponsor the legislation. The comparable figures today—34 Senators and 143 members of the House—have sponsored or co-sponsored this proposed legislation.

While such numbers are encouraging and reflect substantial Congressional desire to have this question actively considered by the Congress, we have set as our goal sponsorship by 51 members of the U.S. Senate and 218 members of the U.S. House of Representatives, Therefore, to those members of the industry who have not participated in this program by personally contacting Congressional representatives from your District, we urge you to do so at once. Report the

results of such contacts to this office promptly.

Now that these—and hopefully additional bills—will be before the Congress, the next task is to have them placed on the appropriate Committee calendar for hearings. The House bills have been referred to the Committee on Interstate and Foreign Commerce and the Senate legislation to the Committee on the Judiciary. In both cases the backlog of pending business before these Committees is extremely heavy. For that reason some period of time will likely pass before hearings on our legislation are called. However, preparations to fully and effectively participate in these deliberations are underway, and we will be prepared whenever hearings are scheduled.

Your personal and active involvement in this critical program is meeting with success. More, much more, needs to be done to overcome this serious challenge to

our industry. If you have not met your responsibility, do it now.

Cordially,

TOM BAKER,
Executive Vice President.

NATIONAL SOFT DRINK ASSOCIATION. Washington, D.C., January 14, 1972.

To: All industry members.

Subject: Interim Report on Franchising Legislation.

I am delighted to report that the industry program to secure Congressional support for our special franchising legislation is making good progress. A large number of bottlers, in conjunction with the State Association, certain franchise associations, or other special industry groups formed for this purpose, have had scores of meetings with Congressional representatives during the Holiday recess.

As a result of this grass roots effort, we now have on file indications that approximately fifteen members of the Senate and fifty members of the House will introduce or co-sponsor the bill. This number of proponents is an acceptable number at this point in time. It is, of course, too early to begin to be overly optimistic since much remains to be done if we are to reach the objective of substantial Congressional support.

There is a noticeable lack of reporting from a number of significant states. Therefore if you have not made the contacts assigned you by the state organization or the key men handling this campaign, please do so at once and report the

results immediately to this office.

Do not let this program fail because you neglected to assume your part of the responsibility.

Cordially,

TOM BAKER. Executive Vice President.

DECEMBER 13, 1971.

### RE: F.T.C.

CNSDA President Harry M. Tonkin and Executive Director Buster Rogers attended a briefing on the status of the F.T.C. matter in Washington, D.C., on Friday, December 3rd, 1971

Tom Baker, Dwight Reed and NSDA Special Council explained step by step all of the material that was received by you from NSDA this week pertaining

to making calls on our legislators during the next thirty days.

On Thursday, December 9th, 1971, the Officers and Directors of CNSDA met in San Francisco to work out details of how to best coordinate our efforts in making the presentation to our legislators.

A list of the legislators for each area were given to the Directors. It is suggested that you contact your Area Director or this office before attempting to contact your legislators. We would also like to request that contact reports be

routed to NSDA via this office so our records can be complete.

We have just been notified that several of CNSDA members have received notice from F.T.C. that they will be supoenaed to appear as witnesses during the early part of 1972. If you are contacted by F.T.C., please advise this office immediately.

### CONVENTION RESERVATIONS

If you haven't made your room reservations for the February meeting, please do it today. EQUIPMENT FOR SALE

Attached is a list of equipment for sale.

NATIONAL SOFT DRINK ASSOCIATION, Washington, D.C., December 3, 1971.

DEAR INDUSTRY MEMBER: At the annual meeting in Houston, Texas, you heard a full report on the status of the Federal Trade Commission action. A vital element of that report concerned the legislative effort being initiated by NSDA to seek Congressional relief from this long and costly judicial process.

Your part must begin now Your Congressional delegation will be home very shortly and it is essential that you personally visit your Congressman and your Senator and impress upon them the peril to this industry that the FTC action carries with it.

Your task is to specifically ask your Representative and Senator to sponsor

the attached legislative draft upon his return to the Congress. Four attachments are enclosed for your use. Study them.

(1) A fact sheet backgrounds you to present the issues to your congressmen. To this general data you must add the impact of your personal situation.

(2) A "talking paper" which states the case and need for legislation in full perspective.

(3) A legislative analysis enables you to tell the congressman the meaning and purpose of the bill you are asking him to introduce; the type of law that would provide the needed relief.

(4) A copy of the legislative language. This is the bill you want your Representative and Senator to introduce when he returns to the Congress. Leave it with him along with the analysis and the "talking paper."

Just as quickly as Congress comes back into session after the holidays a determined drive will begin to pass this legislation. You will be hearing of this effort and your essential role very shortly. Between now and then, however, the Congress must be made aware that a genuine, grass-roots need exists in their individual districts. They must see you and hear you this recess!

This is the beginning. If the industry misses this first critical step it will fail. Your personal role is as vital as every other industry member. Don't think an-

other bottler can do it for you. Act now!

Above all, advise NSDA of every contact you make and of the opinion of each member of Congress. Cordially,

Attachments.

TOM BAKER, Executive Vice President.

NSDA CONGRESSIONAL CONTRACT FORM
State:
Congressman (Senator) Contacted: Date of Contact: Contacted By:
I. The Congressional Representative (Check all appropriate horses)
Will introduce industry legislation.     Will not introduce industry legislation.     Will support industry legislation.     Will oppose industry legislation.
Will not definitely commit himself at this time
This member of Congress genuinely wants to help the industry.  This member of Congress gave a fair audience but did not reveal his opinion at this time.
This member of Congress is non-commital, but additional industry contacts may bring him behind the legislation.  This member of Congress, in my opinion, cannot be persuaded to assist the industry.  This member of Congress will definitely a second to the congress will define the congress of the congress will define the congress of the congress will be second to the congress of the congress will be second to the congress of the congress will be second to the congress of the congress will be second to the congress of the congress will be second to the congress of the congress will be second to the congress of the congress will be second to the congress of the congress will be second to the congress of the congress will be second to the congress of
This member of Congress will definitely oppose industry legislation.  III. Should NSDA staff people call on this member of Congress to further explain the industry position?
IV. Is another contact scheduled at the home District?
V. Remarks (Please give all information gained from this contact which will assist understanding the position of this member of Congress. Use additional paper if required)
VI. Submitted by: Name:
Address:
Telephone:

### FACT SHEET

### THE SOFT DRINK INDUSTRY AND CURRENT FTC ACTION

1. What has the Federal Trade Commission done?

Answer. This agency has charged that eight soft drink franchise companies have illegal clauses in their contracts with soft drink manufacturers. FTC will try to prove that the clause giving a bottler an exclusive sales territory is illegal.

2. Why is the industry going to go to the Congress?

Answer, Because if the FTC successfully prosecutes its complaints, it will destroy the franchise system in this industry as it has existed for more than seventy years; and further, it will bring about the destruction of hundreds of franchised bottles with resultant loss of investments.

3. Since the FTC has filed complaints, why doesn't it make more sense to await the outcome of the cases in the administrative or court processes before

seeking assistance from the Congress?

Answer. Because the administrative-judicial process can take from five to seven years, depending upon procedures established, legal challenges, rulings, appeals, etc. During this period of uncertainty, most bottlers will be reluctant or unable to invest, expand or aggressively market. The industry can wither during this costly wait. Winning the litigation, you may still

4. If the FTC is successful with its complaints, what would be the effect on the

soft drink industry?

Answer, Because the FTC in its complaints seeks to restructure the industry and is alleging that there must be full intrabrand competition within the soft drink industry, the soft drink franchise manufacturer, depending upon his geographic competitive market, will either be destroyed by his neighboring soft drink manufacturer of the same brand products or he will destroy his neighbor. Consequently, instead of effecting more competition within the soft drink industry, the suit, if successful, would result in there being fewer manufacturers competing. As a result, the soft drink industry will tend to become monopolistic.

5. Will success in the FTC suits be beneficial to the public interest?

Answer. Initially, during the restructuring period, the public may realize cost savings as a result of vicious price wars and the struggle for market territories. However, this consumer gain, if secured, will be short-lived. Ultimately, control of the trademarked products will be in the hands of fewer soft drink manufacturers, and prices very likely will rise instead of drop.

6. What other public interest factors should be considered?

Answer, A. Soft drink products are widely accessible to the general public at a reasonable price under the franchise distribution system as it exists. The FTC proceedings would destroy most of this availability to the public. Soft drink manufacturers who will invade a neighboring manufacturer's territory will seek only those accounts which are the most profitable (i.e. chain grocery store accounts). If the predator is successful, the manufacturer whose territory is invaded will find himself left with a market which will not support a reasonable profit, as his sole remaining accounts will be smaller grocery stores, filling stations, corner drug stores, delicatessens, vending outlets, hotels, restaurants, etc. Ultimately, these accounts may not be serviced at all, and therefore will not be available to the general public for the purchase of soft drink products. Even if these accounts are serviced in some manner, the price to the consumer undoubtedly will rise.

Answer B. Since soft drinks are a food product, the quality of that product and its wholesomeness are matters of great importance to the consumer, as well as to the soft drink franchise companies. Identification of the manufacturer of a particular item, therefore, should be readily ascertainable. Under the present franchise distribution system, identification can be accomplished as needed. The FTC proceedings, if successful, would destroy that system with its quality control aspects. Suggested alternative identification methods are much less foolproof, and could increase, rather than lessen, confusion, to the detriment of both the consumer and the industry.

7. What effect would a successful FTC proceeding have upon a large grocery chain?

Answer. The large grocery chain will actually control the distribution system of soft drink products. This would be contrary to the public interest because grocery chain stores already have controlled brand soft drinks which they distribute mostly as "loss leaders" within their stores. Controlling all soft drink products will enable the chain stores to push selected house or other brands by controlling shelf space and availability in retail outlets to the detriment of many existing brands.

8. Would there be any adverse effects upon the local community by reason of a

successful FTC proceeding?

Answer. Yes, Success will mean the demise of the majority of small local bottlers. Consequently, a local manufacturing enterprise will disappear from the scene. In addition to a local labor market being lost, the community will also lose tax income and local reinvestments.

9. How would you best sum up the results of a successful FTC proceeding?

Answer. (a) Large soft drink manufacturers will become larger, and small manufacturers will be compelled to go out of business; (b) years of financial investments would be eradicated; (c) small manufacturers seeking to ward off larger predators will be financially unable to obtain financial assistance for expansion; (d) consumers will be faced with poorer market service and ultimately price increases; (e) one-trip container use will be the rule; (f) the soft drink retail market will become monopolistic and chain stores will control the soft drink distribution system in the United States. In addition, investment, incentive, and local growth will be stifled.

10. Are there any other reasons why legislation is necessary?

Answer. Yes. In addition to the consequences set out above, legislation is necessary to once and for all establish in the antitrust laws the validity of trademark franchise geographic markets. Moreover, legislation is needed to prevent similar future actions by the government which would divest small independent businessmen of their property.

NATIONAL SOFT DRINK ASSOCIATION SUPPORT OF H.R. — [OR S. ———]

### INTRODUCTION

For more than seventy years, the soft drink industry in the United States has operated under a franchise system which has continually and well served the American consumer with a quality product jealously guarded for purity of content and at a price within the reach of all, Perhaps no product is more accessible

to the general public than the soft drink.

The soft drink industry substantially consists of small businessmen, but they represent a strong and vital economic force in over sixteen hundred communities in our country. For example, all but about 100 of the approximately 3,050 soft drink manufacturers in the United States fall within the Small Business Administration's definition of small business; and as of June 1, 1971, there were \$7.7 million in loans outstanding with them. The industry's influence stretches well into the national economy as is evident by its employment of over 135,000 wage earners. The capital investments in plant and equipment of these businessmen well exceed \$1 billion. In 1970 alone they had committed over \$325 million to construct and equip new facilities and expand existing facilities.

In the overwhelming majority of instances, a bottler's principal assets are his capital investment in plant and equipment and the value of his exclusive right to use a franchisor's trademark in a given area. The large capital investments were made in reliance upon the legality of the bottlers' exclusive trademark rights—rights which have been conferred without challenge for almost a century. Moreover, the investments were necessary to fulfill the bottlers' responsibilities under the franchise agreements which conferred the trademark rights—for example, to produce a wholesome product of uniformly high quality and distribute it to retail outlets located throughout their areas. A number of State and Federal courts have had occasion to examine this right of exclusive trademark usage in the soft drink industry and have consistently upheld it. As a result of some of this litigation, the status of the soft drink bottler as a truly independent businessman, free from the abuses that have characterized some of the recent franchising arrangements, has long been established.

The system has worked well. Soft drinks are of uniform quality throughout

The system has worked well. Soft drinks are of uniform quality throughout the country, and national brands compete for consumer acceptance in even the smallest and most isolated communities. Interbrand competition has always been pervasive and intense, and has been heightened in recent years by the sharp

increase in private and retail store controlled brands sales by the large grocery chains. There are, for example, over seventeen different brand cola drinks alone competing for a share of the cola market.

DES. LIPTION OF FEDERAL TRADE COMMISSION (FTC) ACTION AGAINST THE SOFT DRINK INDUSTRY

In mid-January of 1971, the FTC announced an intention to issue complaints against seven soft drink franchise firms. A complaint is served when the Commission has "reason to believe" that the antitrust laws of the United States have been violated (Section 5 of the Federal Trade Commission Act. 15 U.S.C. 45). Unless the named respondent enters into a consent order with FTC (such orders usually say we haven't done anything wrong, but we won't do the complained about conduct anymore), the issues raised are adjudicated at the Commission. Thereafter, they are oftentimes litigated in the Federal courts. The advisability and the time of institution of a proceeding are at the discretion of the FTC.

The complaints were finally and formally issued under date of July 15, 1971, and service of them began on or about July 27, 1971. They allege generally that the named companies have hindered or eliminated competition in the soft drink industry by restricting soft drink manufacturers to designated geographical areas.2 There is no allegation that interbrand competition is lacking in the soft

drink industry.

The Commission evidently is seeking in these cases to extend the decision of the Supreme Court in United States v. Arnold Schwinn & Co., 388 U.S. 65 (1967). This case held that it was a violation of the anti-trust laws for a manufacturer of bicycles to impose limitations on the territory in which, or the customers to whom, distributors could resell the goods after a completed transaction had taken place between the manufacturer and distributor. Identical territorial limitations, however, were upheld by the Court in Schwinn where the manufacturer continued to share market risks with his distributors through agency arrangements. In any event, the Schwinn decision did not consider a trademark licensing arrangement comparable to the soft drink industry in which many local small businesses share with a franchising company the risks and rewards involved in manufacturing a trademarked product as well as those

Hearings have not as yet been scheduled on these complaints, but it is expected that adjudication before the Commission's hearing examiner will begin shortly. The process of litigation, including appeals to the courts, may well

require four to seven years.

### EFFECT OF FTC ACTION ON THE SOFT DRINK INDUSTRY

Our conclusions come first. The soft drink bottlers of the nation think the objectives sought by the FTC will be disastrous for the industry, if achieved, and positively detrimental to the public interest. Bottlers do not view the territorial system as an imposed limitation on their competitive freedom. To the contrary, they consider this system as the only feasible means of assuring to the public the advantages of intensive local competition and service among national and private label and store controlled brands, and the only reasonable way by which prudent businessmen would undertake the extensive risks and responsibilities of soft drink bottling.

The results which soft drink bottlers see as following from the destruction of the territorial system which the Commission seeks include the following: (1) elimination of the large majority of independent small bottlers who are presently active competitors in the industry and important economic contributors to their local economies; (2) a total loss by governmental action of the millions of dollars of investments made by these bottlers in reliance on contract provisions which have been upheld by Federal courts; (3) substantial concentration of the soft drink bottling business into a handful of regional

¹ Beverages International (Crush International) (Docket No. 8853).
Dr. Pepper Co. (Docket No. 8854).
The Cora-Cola Co. (Thomas Corb.) Docket No. 8855).
PepsiCo., Inc. (Docket No. 8856).
The Seven-Up Co. (Docket No. 8856).
The Seven-Up Co. (Docket No. 8857).
The Royal Crown Cola Co. (Docket No. 8858).
National Industries, Inc. (Cott Corp.) (Docket No. 8859).
² A similar complaint was proposed by FTC for filing against the Canada Dry Corp., on September 28, 1971.

metropolitan companies; (4) an alarming increase of the economic power of the major grocery chains to control the soft drink market in favor of their store controlled label brands; (5) elimination or substantial reduction in competition for the many small volume retailers who depend on the local bottler's route sales method of operation; and (6) no long term increase in competition

or reduction in prices to the consumer.

Such dire prediction require explanation. Undoubtedly the staff of the FTC is genuinely seeking to promote the public interest; and, on a superficial view, the elimination of territorial restrictions would appear to promote competition with a corresponding benefit to the public and to the unrestricted bottler. This theoretical analysis, however, ignores many hard facts and realities of the marketplace. The marketing method traditionally used by the soft drink industry has been sales and service by route delivery. This method requires and in fact has produced intensive competition between the bottlers of the different national brands for the trade of virtually every restaurant, filling station, and other outlet in the territory and competition for shelf space within the supermarkets. Low prices and good service to the public at all retail outlets have been the results of this method. Some of the large grocery chains, however, find this method inconvenient with their practice of mass purchasing from suppliers and redistribution through warehouses to their retail outlets. This is particularly true of those chains which offer their own private brand beverages in competition with the national brands. Such grocery chains have therefore demanded warehouse delivery of soft drink products in large volumes at reduced cost. Generally, the chains which want central warehouse delivery are interested only in cans and nonreturnable bottles since they are unwilling to assume the cost of dual handling and local storage space at the retail outlets which are inherent in returnable bottle use. Generally, soft drink bottlers have resisted demands for such bulk warehouse deliveries because they have been considered incompatible with the territorial franchise system under which the industry has prospered.

If this territorial system is destroyed as a result of the FTC action, warehouse delivery to the large grocery chains and other volume buyers will become the rule rather than the exception. Those bottlers fortunate enough to be located in close proximity to the chain's warehouses or who are in financial position to restructure their methods of operation to specialize in only large volume customers over a wide geographic area will be able to increase their sales. The majority of bottlers, however, who are neither fortunately situated nor financially able to quickly adapt will inevitably be placed in a precarious economic and competitive position. The cost of distribution to small volume outlets (such as "mom-and-pop" grocery stores, drug stores, office buildings, and vending competitive position. The cost of distribution to small volume outlets (such as grocery chain retail stores). Therefore, bottlers left with only the smaller volume outlets will immediately suffer sharp reductions in sales and be forced to raise prices to their remaining customers. Without some sort of territorial protection for their trademark rights or the large customer base of a metropolitan area, bottlers will become credit risks unlikely to obtain the financing necessary to compete under the changed circumstances. Only large metropolitan bottlers now have the customer base and financing necessary for the \$1,000,000 plus investment required for the production of nonreturnable containers demanded by the chains. It is an exercise in fantasy to expect many of the smaller bottlers to be able to make an investment of this kind on the mere hope that they will in some way be able to compete successfully in the restructured market.

Thus, in the opinion of the people who know the industry best, the success of the Commission's complaints will inevitably lead to the demise of the majority of small local bottlers. An increased trend to mergers may be the only alternative to a rash of bankruptcies. Should that happen, any immediate, short-term gain in intrabrand competition which might result from the Commission's action would surely be far outweighed by a long-term loss to competition in general. Once the large grocery chains and the surviving regional bottlers are dictating the terms of the competitive struggle, the smaller retail outlets and the consuming public will be sure losers. The chains' present emphasis on nonreturnable containers despite their higher retail prices is illustrative of their lack of desire to save the consumer any money. Soft drink bottlers are skeptical that any savings the chains

might realize in lower wholesale prices will in fact be passed on to consumers. If, as bottlers predict, the FTC's action results in the restructuring of what is now a competitive industry of about three thousand local manufacturing concerns into a highly concentrated one with only a few hundred regional companies, the loss of years of financial investment by the unlucky bottlers might still be justified if in some way the public is benefited. But monopolistic rather than competitive pricing, reduced or no competition and service to smaller retail outlets, loss of easily identifiable manufacturer responsibility for pure quality beverages are the more likely results which will flow from this action; and these results are not in the public interest. Ironically, the purpose of the Federal Trade Commissions Act will have been used to achieve the opposite of the Congressional intent.

In summary, the soft drink manufacturer submits that the following results

will ensue :

1. Large soft drink manufacturers, as previously stated, will become larger, and many smaller manufacturers will be compelled to quit the marketplace. New soft drink entries into markets will be more difficult if not impossible. With the demise of many manufacturers, some products will become unavailable in many market areas. It would follow that consumer choices and options would be

2. Years of financial investments would be eradicated. Many small bottlers will be fearful during years of litigation to reinvest in their businesses when the venture might well accrue to the benefit of another soft drink manufacturer mar-

keting the same brand.

3. When the smaller manufacturer is faced with the necessity of expansion in his market to ward off the larger predators selling the same brand product, his opportunity to obtain financial assistance for expansion will be diminished. is even true during the period of litigation. Thus, the soft drink marketplace will become static.

4. The consumer in many markets will face the following detriments; poorer market service—service would simply stop to the smaller, less profitable retail accounts; price increases; use of the one-trip container would be spurred as the market mix of the more expensive returnable bottle would make container ownership obscure; and determining liability would become difficult since the origin of the product could be from more than one manufacturer in a particular market.

5. The soft drink retail market will become monopolistic dominated by large volume outlets and chain stores with their own warehouse controls on the distribution system and absent the many small outlets which now proliferate every locale. Finally, many local communities would witness the removal from their locale of local capital, labor, and taxes. Investment, incentive, and local growth

will be stifled.

These briefly, then, are the compelling considerations which should be taken into account when one attempts to evaluate the prudence and wisdom of any attempts to declare unlawful a method of doing business which in the soft drink industry has for more than seventy years permitted small businessmen to enter and compete in the American economy.

### NEED FOR LEGISLATION

Since no agreement has been, or is likely to be reached between the soft drink industry and the FTC, the long, expensive process of litigating the issues through the Commission and the courts will take place. The National Soft Drink Association, the national trade association representing the soft drink bottlers interests, has taken a firm position that the objective sought by the FTC are contrary to the best interest of the consumer, the soft drink bottlers, and the small business community. It will seek to represent the bottlers' interest in whatever legitimate manner will best preserve the industry's seventy year old territorial system. Similar positions have been taken by The Coca-Cola Bottlers' Association. the Pepsi-Cola Bottlers' Association, and the Dr. Pepper Bottlers' Association.

Although the industry is confident that the reasonableness and legality of its territorial system will ultimately be upheld by the Commission or the courts. defending the actions alone is not enough. During the four to seven years the litigation will take, all bottlers will face paralyzing uncertainty as to the conduct of their businesses, and many of the smaller bottlers will choose to merge or sell out rather than gamble their substantial investments on the outcome of

the litigation.

Further, the potential disastrous effects of the FTC's action against one of the few remaining small business industries in our economy with no corresponding public benefit presents a situation which merits national legislative attention. In short, the industry thinks the matter is too important to be left to the sometimes capricious processes of litigation.

### DESCRIPTION OF LEGISLATION

The legislation which has been introduced has the objective of assuring that, where the licensee of a trademarked food product, whether he be a bottler or

the licensee of another food product, is engaged in the manufacture, distribution, and sale of such product, he and the trademark owner may legally include provisions in the trademark licensing agreement which give the licensee the sole right to manufacture, distribute, and sell the trademarked product in a defined geographic area or which limit the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within that geographic area, subject to the conditions that: (1) there is adequate competition between the trademarked product and products of the same general class manufactured, distributed, and sold by others, (2) the licensee is in free and open competition with vendors of products of the same general class, and (3) the licensor retains control over the nature and quality of such product in accordance with the Trademark Act of 1946 (the Lanham Act). Thus, if the legislation is enacted, each territorial arrangement would be viewed in the economic context in which it operates and the existence of competition in the market would be taken into account, subject to the further requirement that the nature and quality of the licensee's goods or services in connection in which the mark is used are legitimately controlled by the licensor in accordance with the Trademark Act of 1946. These are traditional, legal concepts. The legislation seeks no more than to continue the climate created almost a century ago and which has been part and parcel of our national econonly unencumbered until the current FTC action. It establishes nothing new and asks no more than to continue in the same atmosphere where vigorous interbrand competition has produced quality, quantity, low price, nationwide availability, and a healthy, small business complex which has proven beneficial to the consumer.

2D Congress	[NoteHouse and Senate versions would be identical]				
1st session	H.R. ———				
	IN THE HOUSE OF REPRESE	NTATIVES			
Mr	of ————	- introduced the following			
Com	bill; which was referred to				

A BILL To amend the Federal Trade Commission Act (15 U.S.C. 41) to provide that under certain circumstances exclusive territorial arrangements shall not be deemed unlawful

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 41) is amended by insertion of a new Subsection 3 as follows:

"(3) Nothing contained in this Act, or in any of the Anti-trust Acts, shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture (including manufacture by a sublicense, agent, or subcontractor), distribution and sale of a trade-marked food product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution and sale of such product only for ultimate resale to consumers within a defined geographic area; provided that this Subsection shall apply only if: (1) such product is in free and open competition with products of the same general class manufactured, distributed and sold by others, (2) the licensee is in free and open competition with vendors of other products of the same general class, and (3) the licensor retains control over the nature and quality of such product in accordance with the provisions of the Trademark Act of 1946, as amended (15 U.S.C. 1051).

Sec. 2. Subsections "3", "4", "5" and "6" of Section 5(a) are redesignated

"4", "5", "6" and "7" respectively.

Sec. 3. Subsection 5 (as redesignated) of Section 5 (a) is amended by deleting "(3)" and inserting "(4)" in lieu thereof.

# ANALYSIS OF DRAFT LEGISLATION TO AUTHORIZE EXCLUSIVE TERRITORIAL ARRANGEMENTS IN TRADEMARK LICENSING AGREEMENTS

## · Provision of Suggested Bill

1. "Nothing contained in this Act, or in any of the Antitrust Acts, shall render unlawful"

2. "the inclusion and enforcement"

3. "in any trademark licensing contract or agreement"

4. "pursuant to which the licensee engages in the manufacture (including manufacture by a sublicensee, agent, or subcontractor), distribution and sale of a trademarked food product."

5, "of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or ..."

### Meaning

"This Act" refers to the Federal Trade Commission Act. The words "Antifrust Acts" are defined in Section 4 of the Federal Trade Commission Act. The words "Nothing... shall render unlawful" means that if the requirements of the legislation are met, these Acts shall not be interpreted to prohibit territorial restrictions.

resultituous. The word "enforcement" reaches the possible argument that, while inclusion of a territorial restriction in a franchise agreement is not illegal, as in the case of restrictive housing covenants the

courts are not required to assist in their enforcement.

The only agreements which would be covered by the legislation are those which provide for the licensing of a trademark and require the performance of specific functions in a particular territory. In order to come within the scope of the statute, the licensee

In out 10 come within the second control of must perform must be engaged in more than mere distribution; he must perform a specific manufacturing function as well.

a special manutacturing function as wen.

The words "(including manufacture by a sub-licensee, agent, or subcontractor)" cover the situation where the licensee acquires product from a supplier and then offers it for sale.

produce from a supporer and then observed as licensing agreement, would give the licensee exclusive rights in the territory against other licensees of the same trademark owner and against the

6. "limiting the licensee, directly or indirectly, to the manufacture, distribution and sale of such product only for ultimate resale to consumers within a defined geographic area;"

7. "provided that this Subsection shall apply only if: (1) such product is in free and open competition with products of the same general class manufactured, distributed and sold by others," [and] "(2) the licensee is in free and open competition with vendors of other products of the same general class."

S. "and (3) the licensor retains control over the nature and quality of such products in accordance with the provisions of the Trademark Act of 1946, as amended (15 U.S.C. 1051)"

The objective of this language is to permit inclusion and enforcement of clauses prohibiting sales to warehouses within the defined area for transshipment to retail stores outside the terriory, as well as F.O.B. purchases at the licensee's plant for the number of result outside the terriors.

ourpose of resale outside the territory.

The words "directly or indirectly" are intended to encommass

quires the licensor to supply only sufficient product as may be needed to meet consumer demand within the territory.

The territorial restriction would be legal only where, in addition to the allowe requirements the licensed another mosts embeduated.

for ultimate resale within a defined geographic area, or which re-

icense language which specifically limits the licensee to sale only

The territorial restriction would be legal only where, in addition to the above requirements, the licensed product meets substantial competition from similar products, and where the licensee is in a competitive situation with others. These provisos would require a court to view a territorial arrangement in the economic context in which it operates.

The purpose of this proviso is to assure that the arrangements to which this legislation would be applicable are only those which comply with the fundamental requirements of the Trademark Act of 1946 (The Lanham Act).

### SUPREME COURT DECISIONS

In the Federal Trade Commission proceedings attacking territorial agreements between soft drink franchise companies and bottlers, the Trade Commission staff is relying heavily upon United States v. Arnold, Schwinn & Co. The holding of the Supreme Court in that case was that territorial restrictions in agreements between a bicycle manufacturer and distributors who took its finished products on a consignment or agency basis were legal. The Court also said, in a pronouncement that was not required to decide the case, that territorial restrictions in agreements involving a manufacturer's sale of finished products to its distributors are illegal in and of themselves without regard to the question of whether or not the restrictions are reasonable. (It should be noted that, on appeal, the Department of Justice did not argue that the territorial restrictions in Schwinn were illegal in and of themselves but merely claimed that they were unreasonable). Four years before, the Supreme Court had declined to apply such a strict rule of illegality in White Motor Company v. United States.2 There, the Court had said it was too early to say that all vertical restrictions on territories or customers are illegal, and that closer scrutiny of the competitive effects of such restrictions would be required before it could countenance such a strict legal standard.

The Schwinn opinion was careful not to overrule the White Motor decision. Nevertheless, without any comprehensive study of the effects of vertical territorial or customer restraints in various industries, the Court went beyond the specific factual and legal questions before it in Schwinn. Nor did the Court have the benefit of any intervening cases before it since White Motor which might have provided the type of analysis which the White Motor opinion said was necessary for determining the applicable legal standard. Moreover, the Schwinn case involved only finished products—not materials used by the purchaser in manufacturing a product to meet trademark specifications. Thus, *Schwinn* did not deal

directly with the issues at hand.

The objective of the proposed legislation merely is to obtain statutory affirmation of the fact that the reasonableness of territorial restrictions in trademark licensing arrangements which require manufacture as well as distribution by the licensee must be taken into account. The legislation relates only to situations where the distributor is also a manufacturer-which was not the case in

Schwinn.

Furthermore, there is enormous doubt about what the Schwinn decision really means. Legal scholars and lower courts disagree in their interpretations of the case. Moreover, there still has not been a comprehensive study of the effects of vertical territorial restrictions on competition in industry, generally. It could take years for such overriding confusion to be cleared up on a case-by-case basis. In the meantime, the soft drink industry may suffer irreparable harm as a result of the FTC proceedings which are having the effect of impairing good will built by bottlers over many years as well as preventing them from obtaining capital for future financing. That is why legislation is urgently needed.

> THE COCA-COLA BOTTLERS' ASSOCIATION. Atlanta, Ga., October 1, 1971.

To All Members:

Investigators and attorneys for the Federal Trade Commission have contacted some Coca-Cola Bottlers and asked them for information in connection with the pending soft drink franchise cases. These contacts have usually been in the form of a telephone call requesting that a conference be scheduled, sometimes on short notice.

As you know, the Association is actively opposing the position of the FTC in these cases and is extremely skeptical that the FTC can effectively protect the

interests of Bottlers as it says it intends to do.

If you share this view and receive an inquiry from FTC personnel, please let me know as soon as possible in advance of any discussion with the investigator. If you can not reach me by telephone, please call Bill Hames of the Association's law firm in Atlanta [ (404) 522-1600].

It is entirely proper for you to insist that any discussion of these cases is too important to be handled informally and that you, therefore, want your own attorney present at any meeting. We hope you will have your attorney at any dis-

<sup>&</sup>lt;sup>1</sup> 388 U.S. 365 (1967). <sup>2</sup> 372 U.S. 253 (1963).

cussion with FTC personnel, and in some instances, the Association's attorneys might also like to attend.

Sincerely yours,

JOHN S. KNOX, Jr.

THE COCA-COLA BOTTLERS' ASSOCIATION.

Atlanta, Ga., September 3, 1971.

### ASSESSMENT FOR FRANCHISE DEFENSE FUND

To All Members of the Coca-Cola Bottlers Association:

At a meeting of the Association's Board of Governors held in Atlanta on August 30, the Board reconfirmed its dedication and commitment to an all out fight for the preservation of the territorial franchise system.

This week the Association's counsel on behalf of seven of its members filed a petition with the Federal Trade Commission to intervene in the pending

complaint.

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At the August 30, meeting the Board of Governors voted to establish a Franchise Defense Fund of approximately \$200,000 based upon the following scale:

	Assessment
Up to 25,000	\$ 50
25,001 to 100,000	150
100,001 10 000,000	250
500,001 to 1,000,000	300
1,000,001 to 1,500,000	350
1,500,001 to 2,500,000	600
2,500,001 to 5,000,000	750
5,000,000 and up	1 000

The fund will be used solely for legal and other expenses in connection with the protection of the franchise including the administrative proceedings in the Federal Trade Commission expenses if the individual bottlers selected by counsel for the intervention, any necessary appeal to the courts, and the legislative effort which is expected to be under way shortly in the Federal Congress.

An invoice is enclosed. Please check the appropriate bracket and return to the Association with your check without delay. Substantial legal expenses are

being incurred now. A return addressed stamped envelope is enclosed.

Since it is not possible to estimate legal and other expenses at this time, an annual assessment will be made to keep the fund at the \$200,000 level depending upon expenses during the year. It is expected the next assessment to the fund (if required) will not be due until January 1, 1973. The unused portion of the fund will earn interest and at the conclusion of the entire effort the remaining money in the fund will be returned to the bottler-members in proportion to their contribution.

We are advised by counsel that in their opinion this assessment does not violate the President's Wage-Price Freeze. One of the primary reasons the Board decided to raise this fund by assessment rather than liquidating some of its assets was the fact that the dividend income from the accumulated surplus represents substantial income to the Association. In fact, it is now at a level exceeding the revenue received from dues. This is one of the reasons there has been no increase in the Association's modest dues scale in sixteen years. The Association's reserve in stock of The Coca-Cola Company is looked upon by many as a capital endowment which we should not begin to deplete. An additional reason for the assessment is that when spread over our 800 members it is a relatively small amount for each individual plant when the serious consequences of the fight we are undertaking are considered.

The Board has deferred any consideration of a dues increase even though additional services to members and rising costs would indicate the necessity of an increase within the next few years. Because of these factors we have been

unable to add to our common stock reserve fund since 1962.

When this franchise fight is over, we intend to leave the Association in a strong position financially and otherwise so that we will be fully able to effectively defend any other attack which may be made against our industry.

On behalf if the Board of Governors I want to thank each of you for your support and cooperation.

Sincerely,

THE COCA-COLA BOTTLERS' ASSOCIATION, Atlanta, Ga., May 18, 1971.

To the Members of the Coca-Cola Bottlers' Association:

Enclosed are some sample leters which you might use as guides to formulate your own letter directed to your Federal Congressional delegation. Even though you might have written them before, you might want to write them

again to emphasize your feelings about this most serious matter.

The most effective type of contact with your elected representatives is, of course, in person. The second best is written communication, but it is most important that your letter be in your own words which best express your own feelings. It is, therefore, important that the enclosures be considered only guides to give you ideas for your own contact with your representatives in your own way

We will keep you advised of further developments.

Sincerely yours,

JOHN S. KNOX, Jr.

### DRAFT NO. 1

DEAR ---: Many thanks for forwarding to me a copy of the letter you received from the FTC staff concerning the proposed complaint against the soft drink companies charging that their territorial practices were unlawful.

I notice that the FTC letter makes no reference whatsoever to the fact that the territorial limitations in the franchise agreements were specifically the subject of a court proceeding and were held to be lawful under the antitrust laws (269 Fed. 796). This agreement has been in effect for over 50 years and has been a mater of public record known to the enforcement agencies and to Congress. Congress never took any action to overturn this decision. And notwithstanding what the staff of the Federal Trade Commission implies, neither the Supreme Court or any other court has ever been faced with this situation to overrule it.

The Court in that case said that bottling companies such as mine have "perpetual" rights, amounting to "property rights" in the territorial franchises. The Federal Trade Commission now seeks to strip me and my fellow bottlers of such "property rights"-without our even being parties to the proceeding and with-

out compensation to us for loss of these rights.

Do you think that is fair? My father and his father before him and now I have made substantial investments in this business for over fifty years and now we stand to see the value of it wiped out by the action of some administrators, not even by the Congress.

Don't you think that is the taking of property without due process? Most bottlers such as myself are relatively small businesses. We are probably the

ones who can afford such losses least.

It is no answer that the Commission will go through a lengthy hearing and that if it is wrong either it or an appellate court will reverse it. What am I to do in the meantime? Should I make further investments to promote re-cyclable packages? In advertising possible new product lines? Could I ever sell the business if I wanted to for what I've put into it?

Personally I think the Federal Trade Commission announcement is outrageous, harassing and unfair. It is a detriment to small businesses and the only ones

it will help are the big chain stores.

Please help me and other bottlers and small businesses such as myself.

Sincerely yours,

### DRAFT NO. 2

---: Many thanks for forwarding the letter from the FTC staff concerning the proposed complaint against the soft drink companies challenging the territorial provisions of their franchise agreements.

I notice that the staff claims—or perhaps more accurately I should say that they implied—that the proposed proceedings will help small business by enabling

them to expand into adjacent territories.

This is obvious hogwash. Let me just set forth a few facts. My Company is the Coca-Cola Bottling Company of \_\_\_\_\_. It is now owned by me and my family, and prior to that owned by my father, and prior to that it was owned by his father. We are the main business in the town of We have a total of \_\_\_\_ employees, including \_\_\_\_ driver-salesmen. More than 50% of our business is in returnable bottles, which calls for the driver-salesmen not only to deliver the product but also to pick up the empties on their routes.

In order to keep the price low to consumers a nominal deposit is charged on the bottle, which deposit does not cover the cost of the bottle itself. Our Company has a substantial investment in these returnable bottles, in an amount which exceeds our annual profits.

The adjacent Coca-Cola Bottling Company is \_\_\_\_\_, one of the three publicly held Coca-Cola bottlers in the country. All others are closely-held family operations such as my own. The Coca-Cola Bottling Company of \_\_\_\_\_has assets of \$\_\_\_\_, annual sales of \$\_\_\_\_, and approximately \_\_\_\_ employees.

Can you really believe that the FTC proceedings, if successful, will enable me to take away the territory and business of this neighboring company and its territory? Don't you think it far more likely that they will come into my territory and wipe me out, together with this business which is so important to the community. How can the FTC say what it says with a straight face?

Let me just go one step further. Suppose this large company comes into my territory and delivers here. Don't you think it would be worth their while to pick up my empty returnable bottles since it would cost them less to pay the deposit on them than to buy new bottles? As noted above if they do that for one year my entire profit for more than that year is eliminated. How long do you

think I can stand that?

And for all this, who is to gain by it? Only these larger bottlers and only the chain stores. There will still be only one Coca-Cola bottler in the territory but that bottler will be a large one instead of a small one. Is that what you and Con-

gress have intended?

I think the FTC announcement of its proposed proceeding is an outrage. In its letter to you it flatly ignores the fact that more than 50 years ago in a publicly recorded decision, well-known to the Congress and to the enforcement agencies, the territorial provisions of our bottler franchise agreements were upheld by the district court as not being in violation of the antitrust laws. Never has this decision been overruled by the courts or by Congress and the FTC cannot claim that it has been. Now by action of a few administrators it attempts to take away what the court said was a "perpetual" right in the territorial franchise that amounts to a "property right." I thought only Congress could do that and only if Congress compensated us for the taking away of that property right. Certainly that would be the fair way.

It does not need elaborate proof to establish that the soft drink industry is one of the most competitive industries in the country. The Department of Commerce

has event said so. What more can the Federal Trade Commission ask for?

I submit that if the Congress and you are interested in helping the small businessman, such as myself, you will take steps to see that the Commission will not only not seek to upset this long-standing lawful agreement, but, in addition, that it disavow its intention to do anything about it in this industry. Because while this threat to change a 50-year rule hangs over my head, I hesitate to make any additional investment in the business. As a practical matter I can't even sell the business at any reasonable figure because everyone knows that if the FTC is successful they can just walk in and take it away from me.

Please do something. I don't know what, but only you and Congress can help me and small businesses like me from the arbitrary action of agencies such as

the FTC.

Very truly yours,

#### DRAFT NO. 3

DEAR ———: Many thanks for forwarding to me a copy of the letter you received from the FTC staff concerning the proposed complaint against the soft drink companies charging that their territorial practices are unlawful.

I would like to tell you a little bit about the soft drink industry whose structure the Commission is now admittedly trying to change. First of all, this industry has been based upon getting product available to as many consumers in as many places as possible. This is obvious to everyone who has ever seen Coke in gas stations, train stations, airports, restaurants, lunch counters, bars, delicatessens. Mom and Pop grocery stores, drug stores, supermarkets and many other public places.

This is to the interest of the consumer. It did not happen by accident. It happened because the bottler in a particular territory had the incentive to go and develop that business. It is costly to do that. It is expensive to distribute to in-

dividual Mom and Pop stores. But the bottlers are able to deliver to those Mom and Pop stores and enable them to make a profit on the resale of the product because the bottlers have the entire territory and can cover all stores on one trip efficiently.

The result has been that the cost of Coca-Cola to the consumer in a 16 oz. bottle is the same as it was \_ \_\_ years ago. How many other products can make

such a statement.

Now lets suppose the FTC has its way and another bottler can come into my territory. First of all the trip is going to be longer because it's farther away from the plant. This means there will be less time for actual delivery and servicing of stops, such as checking the stock, rotating or putting fresh packages out front, picking up the empties, etc.

So if someone else comes into my territory, he won't be able to serve the same number of accounts and somebody is going to have to be eliminated. Who will that be? Obviously, it's going to be the small-volume low-profit accounts, such as the corner grocery, the drug store, etc. The high-volume accounts, such as chain

stores and supermarkets, will continue to be served.

So, now, we've got two bottlers in the territory one of which serves the highvolume high-profit accounts, such as the chain stores and supermarkets, and the other of which serves unprofitable small accounts. It's perfectly plain what's going to happen. The bottler selling the small accounts is going to go out of business. He can't afford it.

The further consequence is that the small stores like the corner grocery (to the extent that there are any left), the drug stores, etc., are not going to be served. Why should they be served by a bottler from another territory?

They are not going to be adding to his profit.

(To be fair, Mom and Pop stores frequently can be served if the FTC is successful. It doesn't mean that they will never be able to get Coca-Cola. It only means that there is going to be another link in the chain of distribution namely, a wholesaler who is going to add to his profits and increase the price to the small retailer and ultimately to the consumer. Why does the Commission do things that cost the consumer more money?)

So the ultimate result of the FTC announced proceeding, if it is effective in achieving what it wants to do, is not only to drive out small bottlers such as myself but, also, to eliminate or reduce service to the small retail stores in favor of the chain stores. Anyone in business can tell you this. It does not take an expert. And if the FTC thinks otherwise it is closing its eyes to the obvious. In fact, I'm absolutely certain that they know what its called—

namely "skimming the cream off the top of the market.

Now, who is the Federal Trade Commission or the Congress of the United States for? Are they in favor of promoting small businesses such as myself. or do they want to eliminate us and favor the chain stores? They couldn't find an industry more competitive than this—and anyone with his eyes open

can see on a firsthand basis the intense rivalry among brands.

Moreover, the United States District Court ruled in 1921 that our territorial franchise agreements with The Coca-Cola Company are lawful under the antitrust laws. Congress has never said anything to the contrary. The Supreme Court has never said anything to the contrary and the FTC cannot claim that it has. Why does the FTC suddenly decide to try to overrule a decision of the courts that has been on the books for more than fifty years? And why the FTC rather than Congress? That is unfair and as a Congressman of the United States I think you ought to protect me and others like me from such unfairness of other governmental agencies.

Indeed, the mere announcement of the FTC's intention to institute the proceeding will have this deleterious effect upon small companies such as myself. While it is pending should I make an investment in new bottling facilities? In new disposable packages to eliminated litter and waste? In re-cycling facilities? I certainly can't do such things unless I know I'll still be in business—

and I won't know that with the FTC proceeding pending.

Please help.

Very truly yours,

#### DRAFT NO. 4

DEAR ———: Many thanks for forwarding to me a copy of the letter you received from the FTC staff concerning the proposed complaint against the soft drink companies charging that their territorial practices are unlawful.

Let me tell you what's going to happen to small business if the FTC is successful. One of the principal sellers of soft drinks in the community serviced by this company is the chain store. In fact the single brand with the greatest volume in chain stores is the private label of the chain itself.

In short, the chains are my largest major competitors. Indeed, in this area the

chain not only sells its own brand but also owns its own bottling plants.

Who is going to benefit from the FTC proceeding? Well, the principal person is going to be the chain store, a competitor. Who is going to be hart? Small bottlers such as myself.

The net result is that the Commission proceeding is going to help drive me out of business, all to the benefit of one of my major competitors, the large chain

tores.

Is that what Congress wants? I can't believe that it is.

Please help.

Very truly yours,

#### DRAFT NO. 5

DEAR ————: Many thanks for forwarding to me a copy of the letter you received from the FTC staff concerning the proposed complaint against the soft drink companies charging that their territorial practices are unlawful.

I have been seething in slow anger ever since receipt of the Commission's staff's letter. It should be obvious to everyone in this Nation who reads the newspapers, magazines or listens to the radio or TV that the soft drink industry is one of the most competitive in the Nation.

As a result of this competition consumers today can buy Coca-Cola in a 16 oz. package at the same price per oz. that it cost them 50 years ago. Are there many

other industries that can make the same statement?

The Commission staff speaks grandly of our fears being misplaced. But where is the support for their contention that they will be helping either me, or other small businesses like me or consumers? Where has the consumer had a better price break than this? Where are there industries that are more competitive?

If prices were unrealistically high, why has the number of bottlers in the

country declined from 4,500 to 3,500 within the last few years alone?

If the territorial provisions have been unfair, why has the Commission waited 50 years before trying to upset a court ruling that they are lawful (269 Fed. 796)? This ruling has never been overturned. In fact, the Court decided that the territorial provisions are a "perpetual" "property right" of the bottlers. Please help me and other small businesses like me which are going to be

injured by this announced action of the Commission.

I know you may be concerned about interferring with an administrative process. But I submit to you that the shoe is on the other foot and that the Commission is usurping a legislative function. The decision of the courts more than 50 years ago has never been overruled or overturned by any decision of another court. It has been publicly known to the Congress and to enforcement agencies during that entire period. Yet Congress has never done anything to overrule this decision of the courts. To take away a property right of bottlers now without compensation is clearly an exercise of the legislative function—an improper exercise at that—and unfair.

The chips are now down. Whose side is Congress to be on-that of the small businessman such as myself or of large chain stores and other large companies.

Very truly yours,

#### DRAFT NO. 6

DEAR ———: Thank you for sending me a copy of the letter you received from the FTC staff concerning the territorial system established by the major soft drink companies.

My first impression on reading this letter is that the staff has not investigated the business facts of the soft drink industry in depth and has not given much consideration to what may happen to this industry if the proposed complaints are successful.

First, the staff treats bottlers simply as distributors of products made by The Coca-Cola Company. This is not how our industry operates. We are the producers of the soft drinks, using syrups supplied by The Coca-Cola Company and operating as a licensee of its trademarks. Over the years we have invested hundreds of thousands of dollars in bottling plants and equipment and have

made much of this investment in recent years in order to satisfy the changing demands of our customers and the developments of our many competitors. This investment I have made and the investments of thousands of other small bottlers like me will be wiped out without any compensation if the proposed FTC action is taken and sustained by the courts.

Our industry is intensively competitive now, and this has been particularly true in the last ten years since the chain supermarkets have gone into competition with me through their private labels sold at minimum cost in their outlets. This competition has kept the price of my products essentially the same per ounce of beverage as it was —— years ago. This competition has also eliminated dozens of soft drink bottlers in this State alone over the last ten years.

While I can accept losing my business because of fair competition, I cannot accept being run out of business to satisfy the economic theories of Government bureaucrats. My family and I have invested our money and our lives in building this business in reliance on a territorial franchise system that gave us a reasonable degree of protection for our investment. We have thought this was reasonable because these soft drink contracts have been reviewed by the courts and upheld as perfectly legal. Now the FTC wants to completely change the rules of the game. It does not make me feel any better to be told that some bottlers will have an opportunity to serve a bigger market. My territory is not strategically placed, does not have the chain store warehouses to compete for, and cannot justify the investment required to compete in a large regional market for the large volume chain store accounts.

Undoubtedly the chain stores will benefit from the FTC action as will a handful of large metropolitan bottlers, but I am extremely skeptical as to how much cost savings will be passed on to consumers. The price of this "improved" competition, however, will be the elimination of many small businesses such as mine and no competition by anyone for the low volume local accounts who depend on

my route salesmen for delivery.

I hope you can do something to prevent this injustice.

Sincerely yours,

THE COCA-COLA BOTTLERS' ASSOCIATION.

Atlanta, Ga., April 14, 1971.

To the Members of the Coca-Cola Bottlers' Assn.:

Many of you have written your Congressmen and Senators protesting the attack by the FTC on the soft drink territorial franchise system. If you have not done so as yet, let me urge you to get letters off immediately, or better still, to meet with your representatives to discuss the matter personally.

The FTC has been responding to Congressional inquiry by a detailed statement of its position. For those of you who have not seen one of these letters, I enclose a typical response. Many members have stated that they would like to give their

Congressmen the other side of the story in answer to Mr. Ward's letter.

For this purpose we enclose a copy of the memorandum submitted by the Association to the FTC. If you wish, you can send a copy of this memorandum to your Congressmen or use it for ideas in preparing your own answer.

One point that can be emphasized in any letter to Congressmen is that, to the best of our knowledge, this is the first time the FTC has attacked small businessmen to benefit giant, concentrated business organizations such as the supermarket

chains.

Sincerely,

JOHN S. KNOX, Jr.

JSK :mab

A POLICY STATEMENT BY THE COCA-COLA CO., CONCERNING CENTRALIZED BOTTLING, JUNE 1, 1962

A number of Coca-Cola Bottlers with small territories are finding it more and more difficult to make a satisfactory profit due to high costs of bottling and selling the beverage. As a consequence, for the past four or five years, and particularly during the past year, several Bottlers have requested permission to discontinue all bottling of Coca-Cola and to have their bottling done by another plant.

The squeeze on profits could, in most instances at least, be reversed if two or more small Bottlers in adjoining territories could operate a single bottling

plant which could produce the beverage for the combined territories. There is no doubt about the business advantage in consolidating two or more bottling territories, at least for the purpose of the bottling operations. The Management of The Coca-Cola Company is not only alive to the need for such consolidations in quite a number of situations, but it is also altogether in sympathy with the wishes of a number of those Bottlers to bring about such a modification of existing arrangements. This Company has through its various Departments explored the problem both from a business angle and a legal angle with the desire to come up with something that would be helpful to the Bottlers

who are seeking a solution to this problem.

Were it not for certain legal difficulties hereinafter dealt with, The Coca-Cola Company would gladly consent to the consolidation of two or more bottling territories, believing that all parties to the Bottler's Contract would be better off as a result thereof. If one Coca-Cola Bottler is merged with one or more other Coca-Cola Bottlers with the result that a single legal entity, a partner-ship or a corporation, acquires the ownership of the combined territories, then no legal obstacle is presented in the opinion of the Management of The Coca-Cola Company and its legal advisors. In fact, any type of reorganization which would combine two or more existing Bottlers' territories into a single territory owned by a single legal entity would be free from legal objections so far as The Coca-Cola Company is concerned, and it would give the necessary consent on its part to such consolidation.

In many situations, however, two or more adjoining bottling companies wish to combine only for the purpose of the bottling operation, and each of the companies wishes to retain its bottling Contract and to handle the selling of the bottled beverage in its territory. Any proposal of this type presents serious legal questions, not only for the bottling companies immediately involved but

for all Coca-Cola Bottlers in the United States.

The consolidation of the bottling of Coca-Cola by two or more Bottlers and the elimination of a Bottler doing the "bottling and selling" of Coca-Cola with the result that the Bottler would become only a "distributor" of the finished product, would raise serious legal and contractual questions which are of more pressing importance and significance to the Bottler than to The Coca-Cola

Company.

The exclusive right granted to one Bottler to bottle the beverage in a described territory restrains and prohibits all other persons from bottling Cocacola in that territory. The exclusive right granted the Bottler to sell bottled Coca-Cola in his territory carries with it a restraint which prohibits every other person from selling bottled Coca-Cola in that territory. In the early part of this century these Contracts were attacked in Court on the ground that they violate the Federal Antitrust Laws, and the Courts held them to be valid but based their decisions on the single ground that The Coca-Cola Company is the owner of the Trade-mark, that the Trade-mark was to be affixed to the bottle, that the Trade-mark was a representation to the public by the owner of the mark that the beverage in the bottle was of the same high standard the public had been taught to expect in a drink of Coca-Cola and that in order to carry this responsibility effectively, The Coca-Cola Company had a right and an obligation to know "who, where, when and how" the beverage is being bottled. The Courts further said that an exclusive bottling Contract was an appropriate means to accomplish this end. In other words, the exclusive features of the bottling Contracts were held to be valid because of the nature of the bottling operations and the use of the Trade-mark on the bottle.

It is the opinion of the legal advisors of The Coca-Cola Company that a Contract between this Company and any other company which would give the latter company the exclusive right to sell bottled Coca-Cola in a described territory not coupled with the obligation of this latter company to bottle the beverage would be an illegal restraint of trade and that it would be so held by the Courts under the Federal Antitrust Laws. In other words, our legal advisors are of the opinion this Company cannot grant a valid exclusive Contract merely to sell bottled Coca-Cola in a described territory, and that in order to make the Contract legal, the seller of the bottled beverage must also be the Bottler of that beverage. If two or more bottling territories are combined and only one of these bottling companies engages in bottling the beverage, then one or more of the companies will be operating merely as an exclusive seller of Coca-Cola in its territory but will not be bottling the Coca-Cola which it sells. This, we think, would result in the Courts invalidating the Contract should anyone chal-

lenge its legality. The existence of such exclusive sales Contracts would, we are afraid, invite attacks from the Department of Justice in Washington, and should such an attack be made and should an unfavorable decision result, it could involve in a serious way all of the outstanding Coca-Cola bottling Contracts in the country. For this reason, The Coca-Cola Company does not feel that it can, with due regard to all Coca-Cola Bottlers in the United States, consent to any arrangement under which one bottling company does the bottling and another bottling company does the selling of the bottled beverage.

Our arrangement to have Coca-Cola canned by another Party for the bottler is not analogous to the discontinuation of all bottling by the Bottler. The Bottler continues to operate a plant to bottle Coca-Cola in the Standard size package and in most cases all package sizes for his needs. As we did in some instances for new packages because the Bottler was not equipped to bottle the new size package, we have permitted others to can Coca-Cola for the account of the Bottler. Under these arrangements the effect is that the distributing Bottler's syrup is used. In order to protect the interest of the Bottler and as if the Bottler was in fact and in law doing the canning himself, the syrup used in canning is charged to the ordering Bottler as a separate item and another charge is made for the cartons, cans and canning charge. The Bottler receives his five cents gallonage allowance and credit for per capita purposes. These Agreements are made on a temporary basis until at such time as it is economically wise and the Bottler is in a mechanical position to do his own bottling of the new package and the canning of Coca-Cola.

Certain practical suggestions have been advanced which may be available in particular situations. Let us suppose we have three adjoining plants all of which desire to work out some joint arrangement. They could maintain a single bottling plant under a plan whereby each of the companies would bottle their own Coca-Cola two days per week. This would make it necessary to maintain only one botthing plant for the three territories. However, for this to be legally effective each company would have to supply its own syrup, its own bottles, its own crowns and other facilities and use them on the days it operated the bottling plant. A single crew of workmen might be used but they would have to be employed by and put on the payroll of the particular company for the days that company engaged in bottling. Each company would have to handle the employees separately for tax withholdings, Social Security and other legal requirements. If these conditions are met, then each company would in legal contemplation do its own bottling. The fact that the bottling plant would be physically located in only one of the three territories would not present a legal problem provided the plant is in fact and in law operated by each of the three companies on the separate days allotted respectively to these companies for the purpose of bottling.

Therefore, any Bottler holding a Contract must, for his own protection and under the terms of his Contract, do his own bottling of Coca-Cola. We are conscious of today's economic pressures that bring about these requests but we feel that The Coca-Cola Company must not do anything that would jeopardize the

validity of Bottlers' Contracts.

THE COCA-COLA Co., New York, N.Y., November 17, 1967.

To all domestic bottlers under contract with the Coca-Cola Co.:

Developments under anti-trust laws indicate that if you become a mere distributor of a packaged product, a contention may be made that your territorial rights, as presently set forth under your Bottlers' Contracts, would not be

effective as to such products.

For those of you who are in any manner involved in arrangements for Temporary Bottling Agreements, for Returnable bottles or One-Way bottles, or arrangements regarding canned product, your attorney will, no doubt, advise you that there are certain fundamental points to be considered. If you are rendering bottling or canning services for others, you must render such services as Agent and, conversely, if you are having someone else perform the services for you, you must be the principal in arranging for the performance of such bottling or canning services. Your arrangements must not constitute a purchase or a sale of the packaged product as such. Invoices rendered by the Agent should not use "Sold To" but should reflect the applicable charges, including processing fees and insurance, if the Agent is authorized to make arrangements for insurance coverage for the principal.

We have prepared forms of Agreements which we believe to be suitable for your use if you are not directly canning a product or directly producing all of your bottled product. A specimen of the Canning Agency Agreement is attached hereto. If you will advise this Office as to each canner or bottler which you desire to perform the canning or bottling functions for you, the necessary forms will be prepared and mailed to you for execution by the appropriate parties which will include consent by The Coca-Cola Co. Arrangements for distribution of copies to all parties thereto will then be made.

If we can be of help to you or your counsel, please let us know.

Sincerely,

W. L. SUSONG.

#### CANNING AGENCY AGREEMENT

The undersigned Bottler of Coca-Cola (herein called "BOTTLER") has been authorized to process and sell in metal cans the beverage identified by the registered Trade-marks "Coca-Cola" and "Coke" produced from BOTTLER's Coca-Cola syrup (and such other beverages as may be covered by outstanding contracts) pursuant and subject to Contract(s) relating to the bottling and selling of such product(s) in the territory described in said Contract(s). BOTTLER is authorized to identify the aforesaid beverage(s) packaged in such metal cans by the registered Trade-marks of COMPANY but BOTTLER cannot license the use of such Trade-marks by other parties. Pursuant to such Contract(s) and subject to the consent(s) provided for below, BOTTLER desires to appoint the undersigned Canner (herein called "AGENT") as its Agent to prepare and can said beverage. This appointment of Canner as such Agent is based on

BOTTLER's authority to do its own processing and canning.

BOTTLER is obligated to process the product(s) in accordance with instructions and specifications as from time to time are furnished to BOTTLER pursuant to said Contracts. Said instructions and specifications (including any modifications thereto) are incorporated herein by reference and a copy thereof has been provided Canner as BOTTLER's Agent. BOTTLER reserves the right for representatives designated by BOTTLER or others pursuant to said Contracts, to inspect AGENT's plant and to observe actual canning operations, at any time during business hours without notice, to verify AGENT's compliance with said instructions and specifications. The rights derived by BOTTLER under the aforesaid Contracts are dependent upon AGENT's compliance with said instructions and specifications, Therefore, the conditions herein, respecting such compliance and the right of inspection, are material considerations to this appointment and agreement.

AGENT will acquire no right, title or interest in the Trade-marks of The Coca-Cola Company (herein called "COMPANY") that appear on the cans or other packages nor will AGENT be deemed to have made any Trade-mark use of said marks. AGENT acknowledges that the Trade-mark identification of the canned products shall be the use by the Bottler of the Trade-marks appearing on such

cans, which use inures to COMPANY as Owner of said Trade-marks.

This Agreement will be subject to separate commitments regarding other subject matter (such as processing fees) not pertinent to the aforesaid understandings as to control of quality of product and use of Trade-marks. BOTTLER reserves the right to designate COMPANY to initiate billings and to pay AGENT FOR BOTTLER's account, through regular channels, if COMPANY so consents.

AGENT will at its expense provide products liability insurance through insurance companies acceptable to BOTTLER with coverage in the minimum amounts of \$200,000, per person, \$500,000, per occurrence, \$500,000, aggregate for bodily injury and \$500,000, property damage, with additional interest endorsement ("Broad Form Vendors Coverage") attached thereto whereby BOTTLER will be protected. Evidences of such coverage will be provided on request of BOTTLER.

Neither BOTTLER nor AGENT shall be liable to the other for any delays or failure to perform hereunder due to any causes or contingencies beyond their control, including but not limited to fires, accidents, acts of God, war, strikes or other labor disputes beyond their reasonable control, governmental action and any

and all other matters beyond their control.

This Agreement may be terminated by any of the undersigned upon sixty (60) days' notice to the undersigned; provided, that COMPANY's withdrawal of its consent for AGENT to can under COMPANY's Agreement with AGENT will automatically terminate this Agreement. Termination of BOTTLER's bottling

contract(s) will also automatically terminate this Agreement. No party may assign or transfer this Agreement or any right thereunder without the prior written consent of the other Party.

Agreed, this \_\_\_\_\_\_ day of \_\_\_\_\_\_, 19 \_\_\_\_.

(Bottler)

By \_\_\_\_\_\_(Title)

(Canner)

(Title)

Consented to: but pursuant to, and not altering, amending or changing any Contract(s) between company and bottler.

The Coca-Cola Company,
By \_\_\_\_\_, Vice President.

Senator Hart. The committee will be in order. We will resume to receive the testimony of Mr. John R. Strachan of the Pepsi Cola Co. Albany Bottling Co. of Albany, N.Y.

## STATEMENT OF JOHN R. STRACHAN, PRESIDENT, PEPSI-COLA BOTTLERS ASSOCIATION

Mr. Strachan. Thank you, Senator.

Mr. Chairman, my name is John Strachan. And the gentleman to my left, here, is Mr. Robert Sisk, who is the legal counsel for the Pepsi-Cola Bottlers' Association.

I am a bottler from Albany, N.Y., and am president of the Pepsi-Cola Bottlers' Association, whose membership includes 512 of the 513 Pepsi-Cola franchises in the United States.

I am pleased to appear at this hearing to testify in support for the

proposed legislation.

The theoretical economists and lawyers of the FTC say that the 75-year-old soft drink franchise system is illegal and that our exclusive territories must be abolished. We ask you to call off these theoreticians and permit us to continue to compete with other brand bottlers, with regional private labels, with chainstore controlled labels and with all of the many other beverage products available, to call them off before the threat becomes the father to the deed and our bottlers depart or are forced out of this industry en masse, to call them off so that we may continue to supply all consumers with quality products at competitive prices.

I have five points to make: First, I would not be in the soft drink business, and neither would 99 percent of my fellow bottlers if we did

not have territorial exclusivity.

Second, the bill which is before you is bottler sponsored, bottler oriented, and not one for the benefit of the franchise or syrup manufacturers, we know that the entire franchise soft drink industry is hurt by the pending FTC action.

The major syrup companies, however, will survive and continue to sell their concentrate and syrup no matter what happens, but bottlers, especially my size and smaller, will be driven out of this business.

Third, the consumer will not benefit. Retail prices will not be reduced, but will more likely go up as a result of the FTC action, and there will be fewer brands on the market.

Fourth, the only real beneficiary of the FTC theories will be the big foodstore chains, who will market their store-controlled soft drinks, as to wipe out small bottlers, injure seriously, or destroy weaker national

brands and impair the marketing of the strongest.

Fifth, we are not asking you to change the law or create a special exception for bottlers. We believe that the antitrust laws authorize this industry to operate as it has for the past 75 years. But we desperately need confirmation from Congress to this effect, because an important arm of the Federal Government, the Federal Trade Commission, has taken a strongly contrary view.

Unless Congress acts to clarify the law, the FTC's attack alone will damage this industry, impair the confidence of these small businessmen and hasten their departure from the business so that by the time this issue is decided by the U.S. Supreme Court, no matter what the outcome there, the FTC will have acomplished a de facto restructuring

of the industry.

Taking these points briefly in order.

First, I became a Pepsi-Cola bottler in 1953, after resigning as a lieutenant commander from the U.S. Navy, which I had entered upon

graduation from the Naval Academy in 1943.

Together with my brother-in-law, I invested in the Albany franchise and did so only because we were given an exclusive for that territory. With New York City to the south and Boston to the east of us, both territories owned by the Pepsi-Cola Co., and a big independent bottler in Syracuse to the west, I never would have made this investment had we not been granted territorial exclusivity.

I would not thereafter have added 30 vehicles for distribution, would not have built an \$850,000 addition to my manufacturing plant, nor invested another \$1,500,000 in some 3,000 vending machines and other dispensing equipment if we had not had this territorial exclusivity.

I state categorically that if the FTC succeeds in this action, I will not remain a bottler. I will be driven from the business and these in-

vestments will have only distress value.

I have been in contact with almost all of the members of the Pepsi-Cola Bottlers' Association and I assure you that my outlook is no different than that of the overwhelming majority of bottlers.

In reliance upon territorial exclusivity, I built a business having a small share of the Albany market to one where today we are a major

competitor of the large Coca-Cola bottler there.

Supported by my Pepsi-Cola business, I persuaded Orange Crush, Squirt, Schweppes and Hires Root Beer-the first three of which had no distribution in Albany, while the latter was closing its operation there—to take me on as their franchise.

Through this piggybacking, I created additional competition in Albany for branded soft drinks and for those being marketed by food

stores under their own labels.

If I had not had territorial exclusivity, I could not and would not have done so. This competitive story, based on the franchise system, can be matched or bettered by many hundreds of other bottlers in the United States.

My second point, that this is a bottler-sponsored bill, needs no elaboration since many Members of Congress may have already gotten this impression from bottlers who are your constituents.

I do want to point out that the Pepsi-Cola Co. is understandably concerned about this FTC action and we are pleased that it supports

our efforts to obtain legislative relief.

This is not wholly altruistic because if the industry is restructured. sales of national brands will be ended, and although the major franchise companies will survive, they will be hurt while the bottlers are being destroyed.

I should also point out, Mr. Chairman, that the FTC did not see fit to name bottlers—the other parties to the franchise contracts being

challenged—as party defendants in this case.

We believe that the FTC is wrong and that bottlers are indispensable parties. I feel so strongly about it that I have intervened in the FTC case, as has the Pepsi-Cola Bottlers' Association.

I do not understand, and neither do bottlers throughout the country. how any Government agency can seek to abrogate contract rights with-

out all parties to the contract being parties to the litigation.

This kind of unfairness, this disregard for basic principles of due process, has contributed to bottlers' apprehensions and is another rea-

son why we are asking the Congress for help.

As to the consumer, my third point, no one is more concerned than I am on this subject. After all, the consumer is my ultimate customer. Without him, there would be no business. The FTC speculates that recent sales prices would be lower if territories were abolished. This is absolutely false.

We serve every kind of outlet in the Albany area, from bowling alleys, gas stations, laundromats, restaurants, hotels, ski lodges, corner

groceries and drugstores, to the great chainstores.

We deliver the product and put on their shelves, in their vending machines and in their fountains. The FTC's proposal might temporarily permit some minor wholesale cost savings to be realized by one category of our customers—those capable of participating in warehouse delivery, such as the food chains which accounts for less than a quarter of our total business.

The other three-quarters of the market would obtain none of those theoretical economies, and our prices to that much larger remaining segment would have to rise so as to cover the projected loss of some or all of our chainstore business to bottlers from outside our territory.

I could not service all of my remaining lower volume accounts at present prices without the sustaining volume of the chain stores to which we now deliver. Even if I were able to get the chains' warehouse business, which I doubt, I would not have the financial resources to expand my plant capacity sufficiently to supply their needs.

Such supply arrangements would be on a 30-day cancellable basis and this would be too uncertain to warrant financing major plant

expansion.

Although my area is heavy in nonreturnable packages, more than half of the soft drinks sold in the United States are still sold in return-

able bottles and there is a trend back toward returnables.

In every one of the areas where the returnable bottle is important, the consumer would be further hurt by the FTC's proposal, since the cost of the substitute nonreturnable package which, because of the pressures of warehouse distribution, would become the universal package under the FTC proposal, would outweigh any theoretical saving and cost the consumer an additional \$1 billion per year in packaging alone.

And this does not include the ecological costs, that is, the costs of recycling the nonreturnable package. Ultimately, the loss of chainstore business to bigger and stronger neighboring bottlers would force us out of the business.

As more and more bottlers are forced out, and larger and larger territories result, there would be no possibility of *intrabrand* competition. The chains, and everyone else, would be obliged to obtain the product from the one surviving source in this enlarged territory at a price determined by *interbrand* competition. And as many small bottlers leave the business, some of the lesser brands which we have piggybacked will also disappear, thus diminishing interbrand competition.

It is a fact that warehouses of the major chains are located in only a fraction of the 513 Pepsi franchises, and most of those are in the metropolitan areas. So, if we are forced by the FTC theorists into warehouse delivery, I estimate that there will be about 50 Pepsi-Cola bottlers in a position to grab off all of the chain-store business.

The theoretical possibility that smaller, outlying bottlers will be able to undercut their stronger big-city neighbors and compete effectively for those warehouse sales is contrary to the facts of business life.

We not only would not have the capital to take on our stronger neighbors, but we would also be unable to overcome geographic, labor, and other economic obstacles. The business would end up in the hands of the favored 50 and over 400 of us would go down the drain.

And, Mr. Chairman, when we go down the drain, there will be nobody to service the low-volume outlets which have made soft drinks so widely available to the consumer.

I have stated, as my fourth point, that the real beneficiary of the FTC action would be the big food store chains such as the ones which

control Mr. Foster's business in the Taft operation.

Those chains, given warehouse delivery and unfettered control of shelf space, would promote their own soft drink labels to the detriment of the national brands. Here, in hand, are three internal memos of one of the leading chains in the United States which evidence a clear intent to eliminate returnables and curtail national brand competition.

So as not to create unnecessary embarrassment for a still important customer of many bottlers, I will call it "Chain X" and refer to its con-

trolled label as "Chain Beverages."

On March 1, 1972, "Chain X" wrote to its store managers in a city in the South and instructed them to downplay returnable bottles of the national brands and instead promote its own line of "Chain Beverages" as follows:

Floor displays of deposit bottles are becoming more and more prevalent in all of our stores. As a matter of policy, we cannot allow this. We do not want floor displays of any deposit bottles in any store unless the item is in our ad. We do need to promote "chain beverages." The 28-ounce non-returnable bottle will move out in large quantities, at five for a dollar, if this item is properly priced and displayed.

Obviously, they would not have had this problem of floor displays if our product went to their warehouses and our route drivers were not delivering to the stores and setting up such displays.

Six weeks later, the same chain reacted to a promotion by Pepsi-Cola bottler of quart returnables by advertising its 33 stores in one southern city that because of that bottler's heavy advertising, "We find it necessary to stock this (Pepsi) item," but instructed the stores as follows:

We are authorizing displays to earn display allowance on this package. However, it is a must that these are somewhere in the rear of your store so customers will shop this after they have passed your regular beverage department. These instruction are per Mr. "X" and must be followed.

Fellows, there will be much demand for this item. We must have the product available for our customers. However, every effort must be made to maintain and increase our current volume on "chain beverages," both cans and 28-ounce bottles.

Mr. Chairman, shortly thereafter, the same 33 stores were ordered to discontinue handling 10-, 12,- and 28-ounce packages of Pepsi, Coca-Cola, Royal Crown, and Canada Dry. Store managers were instructed that: "The space obtained from these discontinued items must be converted to 12- and 28-ounce chain beverages. There will be no exception."

I have those memos; and if any member of the committee would like to see them. I should be happy to show them to you or to file them with the papers which we are submitting, suggesting only that the committee preserve confidentiality as to which chain and which controlled label are involved.

Senator HART. We will receive them, thank you, with those condi-

tions.

Mr. Strachan. This chain is no exception. Almost every big foodstore chain is now competing with us in the bottling business. Even if they were able to obtain national brands at a lower wholesale price, the probabilities that chains would reduce the traditional price spread between their own labels and the national brands, are very slim—in my opinion, nonexistent.

Store-controlled labels sell on price alone. If national-brand retail prices are lowered, store-controlled labels will not sell. This is why the chains have frequently rejected my price-off promotions, as well

as those of hundreds of my fellow bottlers.

In other words, Mr. Chairman, we could expect that any possible reduction in wholesale prices would not be passed on to the consumer by the chains; they would simply increase their profit on national

Finally, we ask your help because we are being attacked by a powerful arm of the Federal Government in a proceeding in which we have not been made parties, but which nevertheless seeks to abrogate our most important contract rights.

If this Government agency had proceeded responsibly, perhaps bottlers would not be so deeply troubled. But the FTC lawyers have

acted with total disregard for the facts.

Contrary to what the FTC theoreticians have claimed, it is territorial exclusivity which permits small bottlers to survive and not be

overrun by their powerful neighbors.

Contrary to what the FTC theoreticians have claimed, there would be no benefit to the consumer if territorial exclusivity were eliminated. The FTC lawyers proclaimed, originally, that price savings would exceed \$1 billion, amended this downward to one-half billion dollars, and have cut it again in half, now claiming consumers would gain one-fourth of their original estimate.

And they are still wrong. They have ignored 75 percent of the total market which is not susceptible to warehouse distribution, and have disregarded the annual billion-dollar cost of conversion to non-returnable packages.

They have also ignored the fact that the consumer today can buy national brands in returnable packages at the same or lower price

per ounce cost as store-controlled labels.

Although we think that ultimately the courts should rule in our favor, there is a tide of apprehension among bottlers, created by the FTC theorists, which could sweep away the present industry structure.

After all, when you are a small businessman in Presque Isle, Maine, and Kenosha, Wis., or Corvallis, Oreg., and the powerful Federal Government, with such disdain for the facts, strikes at the heart of

your business, you have just got to be worried.

We know that the facts are on our side, and the more detailed statement of them, together with brief statements by the Corvallis and Kenosha bottlers, which we are submitting today, prove this conclusively.

Our legal counsel tells us that the law is also with us. But what does the Corvallis, Kenosha, or even Albany know of the law? We have to

decide whether to invest more in our business or get out.

Mr. Chairman, the country needs Corvallis, Kenosha, and all other small bottlers. It will not have them unless you act to remove this

cloud which covers our business.

Mr. Chairman, I was going to conclude at that point, but since the FTC has filed a motion for summary judgment just this past week, if you would permit me, I would just like to talk on that subject for a few more moments.

Among other things, that motion carries with it an admission that what I have been telling you about, the plight of the small bottler, is accurate. In discussing the relief to be granted, the staff suggests that for a 10-year period, small bottlers be given free reign to sell anywhere, while that which they define as "big bottlers" and syrup com-

panies remain territorially confined.

Obviously, this is an admission that without continued territorial protection, small bottlers will be wiped out. The drastic revision to the franchise system, suggested by the staff, is supposed to (a) Protect the small bottler, and (b) at the same time to promote meaningful intrabrand competition. But any effect it would have on point (a) would only last 10 years, and I doubt that it would have any impact on point (b).

I have not had time to obtain a reaction of other bottlers to it, but let me note what appears to me to be some of the immediately observ-

able defects in the new proposal:

First, the staff's remedy would purport to restrain the so-called big independent bottlers, none of whom are parties to the FTC proceeding, and limit, after a period time, contract rights of all other bottlers who are also not parties to that proceeding.

Such threat of expropriation of contract rights without any regard to due process of law will scarcely reassure our already deeply troubled

bottler body.

The fact that the FTC staff has reneged on their assurances to the Congress and to bottlers that there would be a full evidentiary hearing is also deeply troublesome.

I wrote to the Senators from my home State, in May of 1971, expressing great concern over the then threatened FTC action; and one of them, in turn, communicated my concern to Mr. Alan Ward, who heads up the FTC staff assigned to this matter, who, in turn, replied by letter of June 7, 1971, and made the following flat statement, and I quote:

If the complaints are issued, of course, the respondents will have the opportunity to present a full, factual, and legal defense to our allegations.

Now, 13 months later, Mr. Ward and his staff are moving to cut off that full, factual defense and are, in effect, saying, the defendants in the FTC case should not be given their day in court—this is purely a legal matter -rule against them and let us get on to the remedy.

Second, the staif remedy does not take into account the obstacles of lack of capacity, lack of financial resource, conflicts with existing labor contracts, and costs of long-distance hauling which I have described as virtually insurmountable impediments to a small bottler who might try to take over large accounts in major metropolitan areas.

I am convinced that small bottlers will not be able or willing to take the financial risks involved and could not, practically speaking, capitalize on this offer by the staff of a 10-year license to go hunting for the

customers of the so-called big bottlers.

Third, if the staff's new remedy could be carried out, the result would be forced conversion to nonreturnables, since even with the staff's hunting license, the small bottler could not afford to send re-

turnable glass out of his territory.

Again, the staff has ignored the billion-dollar annual cost of vetionwide conversion to nonreturnables. The staff's remedy would require the Government to police continuously for the 10-year period, the workings of these restructured franchise systems, so as to insure against breaches of the new rules by big bottlers or by customers of big bottlers, who, though not parties to the case, are also to be restrained from doing indirectly what the big bottler cannot do directly.

Policing also would be required to revoke the hunting license of any small bottler whose peculiar circumstances might allow him to become sufficiently successful to pass the arbitrary guidelines for what are big

and what are small bottlers.

In short, Mr. Chairman, the Orwellian implications of the proposed remedy are even more frightening to me than all that has gone before, and I might note that it would virtually be "1984" when "big brother"

would supposedly relinquish these economic controls.

The executive branch of the Government is now clearly trying to legislate and create a new economic system, to govern the relationships of the thousands of independent bottlers, their tens of thousands of emplovees, their hundreds of thousands of direct customers, and their millions of ultimate customers.

We ask the Congress to stop this effort before it destroys the small businessmen who have served the American public so well and Lefore it imposes on the country an economic restrictiving of the industry which will cost that public far more than the FTC staff theoreticians envision.

Thank you very much for letting me appear before you.

Senator Harr. Thank you, Mr. Strachan.

I checked with Mr. Bangert, and the Federal Trade Commission will be testifying tomorrow. We will make inquiry as to the point made in a letter addressed to you from Mr. Ward that you commented on. What was the date of that letter?

Mr. Strachan. It was a letter to Senator Buckley dated June 7,

1971.

Senator Hart. Mr. Bangert?

Mr. Bangert, I only have one area that I would like to discuss with you, and I think Dr. Andersen has a few questions he would like to ask you.

You are representing in your testimony here the Pepsi-Cola Bottlers

Association; is that correct, Mr. Strachan?

Mr. Strachan. That is correct.

Mr. Bangert. How large an organization is this?

Mr. Strachan. It has 512 of the 513 bottlers. Mr. Bangert. Do you have headquarters?

Mr. STRACHAN. We have had staff headquarters in Fort Lauderdale, Fla.

Mr. Bangert. How large a staff do you have?

Mr. Strachan. We have an executive secretary, an assistant, and three clerical helpers.

Mr. Bangert. Do you have economists or statisticians or that type

of staff!

Mr. Strachan. No, sir. Mr. Bangert. Well—

Mr. Strachan. We do employ outside consultants on occasions, for specific projects.

Mr. Bangert. That is what I am wondering. Your full statement

is rather complete, a 78-page statement.

Senator HART. I should have made a comment. I have been leafing through that statement, the attached documentations. It is a very thorough presentation, and I would compliment the person or persons who did the work on that.

Mr. Strachan. Many of us worked on it, thank you.

Senator Hart. Mr. Bangert?

Mr. Bangert. That is what I was wondering. Did you employ out-

side consultants to help to put this together?

Mr. Strachan. In part, I have been seriously concerned in working on this matter. Our association has hired an outside economist to help us with this matter. I have talked to the marketing and legal department of Pepsi-Cola in this matter and gathered data with them, and together with Bob Sisk here we put the report together.

Mr. Bangert. Did the outside economist—was he the one who pre-

pared all the materials?

Mr. Strachan. No, sir: not all of it. Some of that material, in part, comes from conferences that I have attended with Cresap, McCormick, and Pagent, who is later to testify, I believe. Some of it came from the files of our association. Some of it came from material—I don't know what files—supplied to me on request from the marketing department of the Pepsi-Cola Co.

Mr. Bangert. Pepsi-Cola did not write the statement?

Mr. Strachan. No. sir: I would not let them.

Mr. BANGERT. Did they have any part in writing it?

Mr. Strachan. No, sir.

Mr. Bangert. They merely supplied you information? Mr. Strachan. They supplied us with information. Mr. Bangert. I believe Dr. Andersen has some questions.

Senator Hart. Dr. Andersen?

Dr. Andersen. First of all, there has been considerable discussion and comment from time to time regarding the relationship between territorial restrictions and the ecology issue. Now, as we understand in this, where territorial restrictions apply, nonreturnables have been significant.

Mr. Strachan. There is a corridor in the East, from Washington, D.C., right up through Maine, maybe as far west as a line through Syracuse and Harrisburg. West of which, I would say, it is still predominantly, as far as franchises are concerned, a returnable market. That corridor in the East is converted to nonreturnable already.

Dr. Andersen. These are areas where exclusive territories apply,

also?

Mr. Strachan. They apply all over the country; yes.

Dr. Andersen. Does that not raise the question as to how close the relationship is between the issue of exclusive territories and the extent

of nonreturnable use?

Mr. Strachan. Well, my figures—I do not know, if I understand your question—my figures have to do with the 21 billion units of returnable bottles which were sold in the industry throughout the country. These are 1970 statistics, and converting them to their equivalent in nonreturnable packaging, of course, would approximate at a dollar a case, a little over a billion dollars a year that the consumer would then have to pay, nationally.

No; it would not apply to markets that are already converted to a

nonreturnable situation.

Dr. Andersen. I was not asking about what the cost conversion would be. We are merely trying to understand a little better how close this relationship is between restricted territories and the use of nonreturnables.

If, for instance, we do make a decision, from an ecological standpoint, we must not have nonreturnables, it would be nice to know that

indeed restrictive territorial arrangements do the job for us.

The fact that we had these restrictive territories and have had the introduction of nonreturnables, nonetheless makes one somewhat uncertain as to the closeness of the relationship in that regard.

In March of this year, Mr. Baker, of the Soft Drink Association—

Are you a member of that?

Mr. Strachan. Yes, sir.
Dr. Anderson (continued). Presented some material to the Subcommittee on the Environment of the Congress committee. He said a
number of things. One item was of particular interest to us here today.

He said:

Before metal, one-trip containers were available to this industry. Technologically, the increasing rate with which consumers failed to return the returnable containers was quite discernible. In fact, it was this decline in trippage with the corresponding return in earnings which gave birth to the one-trip container and not vice-versa and it is sometimes theorized.

Any realistic effort to reinstate the returnable soft drink container to its former Congress, recognizes that the Congress cannot sweep away these countless consumer elections of convenience over cost by legislative edict.

More to the point, it cannot legislatively ban the motivation behind it.

If the Soft Drink Association considers consumer behavior so critical, are we not overestimating the possible technological benefits derived from the bill being considered here?

Mr. Strachan. Would you put the last portion of your question

to me again?

Dr. Anderson. As I understand, at least part of the idea that Mr. Baker puts forth is we have a situation where consumers are electing for convenience.

Mr. Strachan. No; that is not necessarily true. I would deny that.

Dr. Anderson. You disagree with it?

Mr. Strachan. The nonreturnable bottle is being foisted upon us by the chainstores. We then have to give in to them. We lose the economy of producing a few packages, and we have to add packages and convert to returnables and nonreturnables rather than one on the other.

The fact is that if this FTC complaint does go through, there will not be a returnable bottle left in the United States of America. Furthermore, as they exist today, because of the ecology movement, the conversion from returnables to convenience packaging, that is nonreturnables and cans has been arrested.

The latest figures will show in many areas where the returnable bottle exists, that there is a rebirth—if I may put it that way—a resurgence of the returnable bottle, particularly in portions of the Midwest and in the area up and down the Mississippi River and in the South.

In Los Angeles, they tried to use a returnable package through the chainstore operation. It failed.

Dr. Andersen. This seems to give us, somewhat, some of the ideas

presented elsewhere.

Mr. Strachan. I would like to get on to the differences so we can get to the point. I am interested in the solution to this problem.

Dr. Andersen. In your statement, there is some information pre-

sented on a single franchise Pepsi-Cola-type operation.

Mr. Strachan. Yes.

Dr. Andersen. It is indicated there that there are approximately 301 single franchise bottlers and about 50 more-than-one-plant type of franchise operation.

Mr. Strachan. Right.

Dr. Andersen. There is no information in there on the relative importance from a sales standpoint. I wonder if you could give us a picture of the relative importance from the standpoint of total Pepsi-Cola case movement; how important the 50 largest are relative to these?

Mr. Strachan. They are not relatively the largest. One of the 50 bottlers who is a multifranchise owner has Kenosha and Racine, Wis., and there are single bottlers, for instance, that have Fairfield, Conn., and Burlington, Vt. I would have to look up those statistics and I can do that and provide you the answers.

Dr. Andersen. That would be appreciated. As we have indicated earlier today, we are concerned about what is the distribution of

importance of bottlers across the board. It seems our information indicates the 10 largest Pepsi bottlers account for a major share of

total national business.

Going on, you said 207 of them had annual volume of less than 1 million cases. Again, the question arises, what is going to happen if this bill is passed or if it is not passed, from the standpoint of pressure for consolidation. The information we have from Coke seems to indicate perhaps a million cases per year is the economical minimum-sized plant. It would seem, then, that 207 out of 301—from a production standpoint at least—may be in some difficulty, whether or not this legislation is passed.

Mr. Strachan. Of course, I do not believe that because a small bottler is not necessarily a poor bottler, nor is a big bottler a good

bottler.

Dr. Andersen. I am sure from a quality standpoint, there is no

question about that.

Mr. Strachan, I mean, even from ability to be a viable entity. Some of these small fellows in the boundocks of Wyoming are great bottlers. There is nothing else out there except what they have got.

Dr. Andersen. Well, nonetheless, there seems to be, even within Pepsi, some substantial pressure for some forms of consolidation, at

least for the production.

Mr. Strachan, I think that is no longer a fact, I think the previous administration of the Pepsi-Cola Co.—whereas I could never prove it, perhaps thought that way. They have never, to my knowledge made a statement to that fact, but I was not serving in a responsible capacity with the association at that time. If I can put it this way, I have extracted—and that is exactly what it would be—a statement from the president of the Pepsi-Cola Co., that he believes in the small bottler, and it is just logical why he does, because the big guy is not going to go up there and service those Catskill Mountain and those Kenosha, Wis., accounts, he is just going to let them go by the wayside. But the small bottler will service them.

Dr. Andersen. Is Mr. Benoma the president?

Mr. Strachan, Yes, sir.

Dr. Andersen. At the end of 1971, he had an article entitled "Keeping Up With a Changing Society," dealing with soft drinks.

Among other things, he says:

Some 250 of our Pepsi-Cola bottlers that sell canned products, no longer produce it on individually canning lines. Instead, they have set up joint ownership of 12 cooperative canning plants that provide for the needs far more economically than each could on his own.

He went on to say:

Cooperative action in purchasing cannot help but produce further significant economies even in today's redundant production structure, and much more so for the consolidated facilities of the future.

Is this what is in store? If it is, what does it mean for competition? The next question, in relation to that is, "Does the elimination of exclusive territories really cause firms already tied together in cooperative marketing agreements or production agreements to try to destroy one another?"

Mr. Strachan. If you are asking an opinion, I will answer on that basis, I don't have a crystal ball. But what I envision is that with certain of our packaging, such as the can production cooperatives offer some economies. I daresay it would take me somewhere in the vicinity of \$3 or \$4 million to build a can plant. There are three in the Northeast that Pepsi has. We call them Epic, Laurel, and Clinton's Ditch.

Most of the bottlers up there are small, and as Mr. Foster said, it is primarily due not to population but rather per capitas. Now, there are a number of bottlers in New York State, who would have been incapable of producing a can product and still be competitive with that type of packaging. They put up money to buy stock in what has become a central production facility.

Now, to my knowledge, none of those bottlers want to give up their franchises. Yet, rather than pay \$3 to \$4 million each to construct a plant—and that is a presumption because I do not know that any of them that would be capable of doing that—they have gotten together to do that. Now, that merely serves as a central production facility.

Prior to that, they were obtaining cans from a contract canner who existed very close to the same location. But as his prices went up—he was making a profit—so did wholesale prices. We do not intend to make any profit out of that co-op, but rather it will sustain lower prices for us.

Dr. Andersen. In this same article-

Mr. Strachan. Let me continue. Then, I would envision, that that local bottler would sustain himself doing business as he is today with the availability, through larger manufacturing facilities, of greater economies in the production of this packaging, and therefore, lower

If it did come about that we would eventually have these consolidations or mergers that everybody seems to be concerned about, I think it should be done in a free enterprise system that has been described here before. Our rights would not be expropriated.

Right now, we would stand to lose everything we have. The other way, there might be somebody that would come along and either merge—or sell but at least it would be a viable entity that would be purchased, and whoever sold it would have something to sell.

Dr. Andersen. In your experience, then, you had a situation where you have been recommended as a potential acquisition candidate or ac-

quisition candidates have been recommended to you?

Mr. Strachan. Sometimes I wish they would call. No, sir. I would like to point out one thing. It is not an important factor, I do not believe, whether you are a small or a large bottler, the way that the FTC complaint reads and the way its remedy reads.

And by that I mean, they say here that in seeking to serve an adjacent metro area, a small bottler would face competition from three sources; the present bottler serving that metro area; similarly situated

small bottlers; or a large bottler serving another metro area.

This would mean, as we stand in Albany, as an example, Syracuse could come into Albany and grab that market. And then, I would ask, what would happen with Pittsfield, Mass., Brattleboro and Burlington, Vt., and Keeseville and Glens Falls and Amsterdam, and Newburgh, N.Y. All of whom surround Albany.

When those fellows lose their chainstore accounts, they are going to lose 25 percent of their business and to sustain the balance of it, which is the more costly end of the business, they would have to go up in price. I would like to point out that the chains do not serve those types of vending machines, and other high service cost accounts nor do the

Shastas nor the Fagos. They do not go out and deliver to the "Mom and Pops," to the bars and to the grills, and to the roadside stands.

They have one system; they go through a warehouse.

And if the FTC wants to put bottlers out of business and make Pepsi-Cola and Coca-Cola and Seven-Up a product that is available only in chains, then their complaint is ideal.

Dr. Andersen. Is all Pepsi syrup sold through franchises?

Mr. Strachan. Yes.

Dr. Andersen. Including the postmix?

Mr. Strachan. That is what I mean by syrup, the postmix.

Dr. Andersen. That is not true of Coke.

Mr. Strachan. I am not completely familiar, but I believe, in some instances, it does go through franchises. The ones I am familiar with, Hires Root Beer, Orange Crush, will sell and deliver to anybody. They sell and deliver to us and then they sell and deliver to anybody else in the territory.

Dr. Andersen. Thank you. That is all.

Senator HART. Mr. Sisk, did you have anything you would like to add?

Mr. Sisk. No, sir.

Senator Hart. Thank you very much, gentlemen.

This concludes the testimony scheduled to be received today, however, first, let me order printed in the record the statement of the chairman of the Committee on the Judiciary, Mr. Eastland in support of S. 3133.

If we have not ordered it, I think we should have printed in the record the several bills on which the hearing is based and the Trade

Commission order.

Senator HART. Hoping to make a little more certain we will not run out of time in the next few days, and assuming that the witnesses can be found for tomorrow who are able to get in here at 8:30, we will adjourn now to resume in this room at 8:30 in the morning.

We will then plan to adjourn until 8 o'clock Thursday morning. We will recess at about 10 o'clock tomorrow morning for an indefinite

period because of a caucus that was scheduled last night.

An additional witness for tomorrow will be Earl Kintner. Also, if the schedule permits, Senator Cooke.

(Thereupon, at 2:15 p.m., the committee recessed, to reconvene at

8:30 a.m., Wednesday, August 9, 1972.)

(Documents mentioned follow. Testimony resumes on p. 161.)

PREPARED STATEMENT OF SENATOR JAMES O. EASTLAND IN SUPPORT OF S. 3133

Mr. Chairman, I welcome the opportunity to appear here this morning in support of S. 3133, which I introduced on February 7, 1972. This bill is supported by forty (40) of my colleagues (see exhibit A) in the Senate who feel as I do. It has enjoyed a wide appeal as is evidenced by this healthy bipartisan support. It merits the serious and immediate, favorable consideration of the Congress.

Complaints filed by the Federal Trade Commission in mid-July a year ago allege that soft drink franchise companies have hindered competition in the soft drink industry by restricting soft drink manufacturers to designated geographic areas. The Commission did not make the bottlers parties to the litigation.

Hearings have not yet begun on the Complaints. The process of litigation, with appeals through the court, could well require as much as seven (7) years to complete. During this time, the small businessmen in the bottler community will suffer an economic paralysis created by the legal uncertainties involved.

I am quite familiar with the soft drink industry in this country and have first hand knowledge of it in my home State of Mississippi, where 66 soft drink manu-

facturers employ over 2,000 workers. In my opinion, the objectives sought by the FTC will be disastrous for them and many hundreds like them. I know the small business characteristics of this industry. For example, 77 percent of the plants in Mississippi employ less than 50 workers, 21 percent less than 200 and 2 percent over 100. These kinds of statistics can be repeated over and over again throughout the country. These are the businessmen who have been placed in jeopardy by the FTC's Complaints, which in my opinion use the antitrust laws for a purpose never intended by the Congress; namely, as a weapon against small business. This legislation, which I address myself to today, has as its objective the assur-

This regislation, which I address myself to today, has as its objective the assurance that whenever a licensee of a trademarked food product is engaged in the manufacture, distribution, and sale of such product, he and the trademark owner may legally by contract include defined geographic areas for the sale of the trademarked product. All the competitive safeguards of like products in the same general class in open competition must be present. The legislation seeks no concessions; it asks for nothing new. It simply permits the continuance of the climate begun almost a century ago, which has been part of our national economy, unencumbered until the current FTC action. There has been vigorous interbrand competition in the soft drink industry throughout the years and there is more rather

than less such competition today.

To another point, Mr. Chairman, a document dated April 14, 1972, was sent to me by the FTC. I understand it enjoyed a wide circulation in both Houses of the Congress, It was signed by Mr. Alan Ward, Director of the Bureau of Competition at the FTC and by the Commission's Director of the Bureau of Economics, H. Michael Mann, I might note in passing that Commissioner McIntyre abstained from the Commission's action authorizing the document's presentation to the Congress. This FTC document clearly states its opposition to my bill. S. 3133 and others identical with it. In all candidness, I must say that this effort would certainly appear to be an unprecedented lobbying effort by a Federal administrative agency. I have serious doubts as to its propriety and wisdom.

Since the reception of the Commission opposition statement, I have received a complete and extensive response from the soft drink industry's association, which represents the bottler community throughout the United States. This re-

sponse answers the points raised by the Commission.

Mr. Chairman, I would like to submit this response to you at this time. I feel it will benefit the deliberations of the subcommittee and I ask that it be made part of the record of these hearings.

I believe this subcommittee is undertaking a very necessary and important step in convening these hearings and I hope that very quickly the wisdom of this legislation will be recognized and favorably acted on.

I thank the Chairman for this time allotment and wish him and the sub-

committee well in their deliberations.

EXHIBIT A.—Members of the U.S. Senate Sponsoring or Cosponsoring Identical Senate Bills Nos. S. 3040, 3116, 3133, 3145, 3548

James B. Allen (D-Ala.) Gordon Allott (R-Colo.) Clinton P. Anderson (D-N.M.) Howard H. Baker, Jr. (R-Tenn.) Henry Bellmon (R-Okla.) Wallace F. Bennett (R-Utah) Lloyd Bentsen (D-Tex.) W. E. (Bill) Brock (D-Tenn.) James L. Buckley (C-N.Y.) Quentin N. Burdick (D-N.D.) Lawton Chiles (D-Fla.) Marlow W. Cook (R-Ky.) John Sherman C per (R-Ky.) Carl T. Curtis (R Neb.) Peter H. Dominick (R-Colo.) Robert Dole (R-Kan.) James O. Eastland (D-Miss.) Sam J. Ervin, Jr. (D-N.C.) Paul J. Fannin (R-Ariz.) Edward J. Gurney (R-Fla.) Clifford P. Hansen (R-Wyo.)

Mark O. Hatfield (R-Ore.) Ernest F. Hollings (D-S.C.) B. Everett Jordan (D-N.C.) John L. McClellan (D-Ark.) Gale W. McGee (D-Wyo.) Jack R. Miller (R-Iowa) Frank E. Moss (D-Utah) Robert W. Packwood (R-Ore.) James B. Pearson (R-Kan.) Charles H. Percy (R-Ill.) Jennings Randolph (D-W.V.) William B. Saxbe (R-Ohio) Margaret Chase Smith (R-Me.) John J. Sparkman (D-Ala.) John C. Stennis (D-Miss.) Ted Stevens (R-Alaska) Herman E. Talmadge (D-Ga.) Strom Thurmond (R-S.C.) John G. Tower (R-Tex.) Milton R. Young (R-N.D.)

PEPSI-COLA BOTTLERS ASSOCIATION, Fort Lauderdale, Fla., September 12, 1972.

Re S. 3133 and similar bills. Senator Philip A. HART,

Chairman, Senate Antitrust, and Monopoly Subcommittee,

Washington, D.C.

Dear Mr. Chairman: I wish to thank you again for the courtesies which you extended to me and to the Pepsi-Cola Bottlers whom I represent during the August Hearings on the above bills and to respond briefly to your kind invita-

tion to supplement the testimony I gave.

We believe it is urgent that the Congress take action now on these bills because real injury to bottlers is occurring every day by virtue of the pendency of the FTC action. Among other things, the resale value of a franchise has already declined markedly. (Who would want to buy something now which he may one day be able to get for next to nothing?). Concomitantly, there has been a substantial reduction in the amount of capital being invested by bottlers in this industry. And there is a growing tendency among small bottlers to get out of the business. From my many contacts with our bottlers throughout the country, I know that there is great apprehension over the pending FTC proceeding and that these results are directly attributable to that proceeding.

Injury to these small businessmen might not, in itself, justify special legislation, if it could be demonstrated that there would be a substantial public benefit to be gained from the FTC action. But the fact is that the total restructuring of this business sought by the FTC staff will actually cost the consumer more money and satisfy only the economic theorists who devised this conceptual attack upon an industry which in practice has for so many decades operated efficiently and competitively, and which has made a consistently low-priced

product available universally to the public.

The soft drink business is, I believe, unique: unique in its requirements for heavy capital investment by franchisees; unique in the manufacturing and market development tasks which franchisees must undertake; unique in the way in which franchisees are able to piggy-back lesser brands by virtue of the strength of their principal trademarked product. I know of no other business involving manufacturing franchisees which provides the depth of competitive options which the soft drink business gives to the consumer. In any given territory of any given bottler, widely varying retail prices may be found for the same brand of product. There really is no comparable situation in which there are thousands of sellers who are also manufacturers of the product.

If ever there were a situation which would warrant Congressional action, The Supreme Court has already invited Congress to act on a far less compelling one (United States v. Topco Associates, March 29, 1972, involving horizontal restrictions). There can be no question that the FTC is attempting to usurp the role of the Congress in its unprecedented effort to restructure the industry through the imposition of handicaps, guidelines and 10-year rules. It would be tragic if Congress were to surrender its legislative responsibilities

to an administrative agency.

You may well ask why we are calling for Congressional action now, rather than after the case is concluded. I believe our chances of ultimately prevailing are good. But the time factor is crucial. Unless this legislation is adopted, the complaint will be litigated through many stages within the agency, and then, perhaps, through the courts. Past experience suggests that this could take as long as six or seven years. During that time, the value of our franchises will continue to be depressed. The bottlers' reluctance to invest in new capital equipment will grow. Winning will vindicate our view that this was an unnecessary harassment of the soft drink bottling industry, but it will not restore the values we lost or the progress we might have made. If the Congress shares our conviction that the present system serves both the public and the businesses involved, it should act now, rather than wait for the damage to be done.

The principal private opposition to the proposed legislation at the Hearings in August came from two bottlers located in one section of the country where some interest has been shown by some large chain stores in changing the method of handling soft drinks. While I have no desire to engage in a debate with these gentlemen, I feel it is important to comment on their testimony.

Mr. Foster (Taft Coca-Cola) and Mr. Alden (Denver Royal Crown) testified that the franchise system inhibits them and that through their method of operation (warehouse delivery) some economies could be realized by the consumer. This testimony is erroneous and misleading for the reasons given in my testimony, which significantly no witness really challenged. The principal defects in

the testimony of these two disaffected bottlers are:

(1) It presupposes that all customers of bottlers could be serviced through warehouse delivery, and this is not true. Those who could *not* obtain such delivery are the *majority* of our customers, and prices to them would have to be *increased* to cover loss of chain store business to the warehouse operator. Consumers buying through nonchain store outlets would pay more for soft drinks.

(2) Messrs. Foster and Alden are talking only about selling cans. This package presently accounts for less than 10 percent of the total volume of franchised soft drinks sold through grocery stores, and is the only package susceptible of being shipped long distances at competitive prices. Non-returnable bottles, for example, cost almost three times as much to ship. So the opposition testimony is promoting a single package for which consumer preference at this time remains relatively small and a method of distribution for which interest has been demonstrated in only one section of the country.

(3) Mr. Foster and Mr. Alden would also admit (if cross-examined) that their package costs the consumer more than returnable bottles. The Foster-Alden substitute for the franchise system would result in forced conversion to non-returnables by all bottlers, with a \$1 billion price boost to the consumer each year for the cost of packaging alone, plus increased ecological costs for retrieval and

recycling the throwaway package.

(4) Messrs. Foster and Alden are the only bottlers in the country, I believe, who hold these ideas. Whether Mr. Foster genuinely believes that his substitute system would work or whether he is motivated in his testimony by his lawsuit against Coca-Cola Company or by the fact that he is 51-percent owned by a large retail food chain I do not know. I also do not know what motivated Mr. Alden who for many years as a "marketing specialist" for food chain stores to buy his franchise 3 years ago; whatever his original motives were, it is clear now that he is trying (perhaps with the backing of his chain store clients) to destroy the franchise system. These are, however, pertinent questions for the subcommittee to consider in evaluating their testimony. All of the Pepsi-Cola bottlers, to my knowledge, are convinced that the substitute system proposed by Messrs. Foster and Alden and the FTC staff would result in no gain to the consumer and in the demise of independent bottlers.

It is highly significant that on this very point the FTC's Director of Policy Planning, Mr. Lawrence G. Meyer, has, since our August Hearings, taken issue with the economic theorists employed by his own agency. In a speech to beer wholesalers on August 18th, Mr. Meyer stated that he differs "dramatically" with the views of the Staff as to supposed "benefits to the consumer" from central

warehousing:

"Here I might add is where my views are dramatically different than those of the staff. The staff, in a memorandum commenting on the pending legislation in this field which I will discuss a little later, stressed the benefits to the consumer through lower prices from central warehousing. Quite candidly, unlike the staff, I am not willing to pay the price in the terms of the possible demise of small business that a continued growth in central warehousing might precipitate."

[Emphasis added] [citing the Staff's "white paper" previously submitted to

Congress].1

On the same day on which Mr. Meyer made this speech, I personally wrote to every Pepsi-Cola bottler in the United States and sent him the text of the FTC's proposed "Metro Area Bottler Handicap", together with a copy of my testimony before your Committee. I requested that any contrary views to those I expressed be immediately communicated to me. As of this date, no Pepsi-Cola bottler in the United States has expressed a contrary view to that set forth in my testimony, but rather their numerous responses have supported the position taken by me.

To sum up: The FTC proposal won't save the small bottler and won't save the consumer any money. It will lead inevitably to wider use of non-returnable packages. It is a legislative adventure by an administrative agency, (the wisdom of which is the subject of debate within the staff of that agency) which could

destroy thousands of independent businessmen.

We are not asking for broad antitrust immunity or "per sc legality." The bills which have been introduced would still permit legal action to bar excessive concentration and/or any other unreasonable restraints of trade. Most important, they would preserve the system under which bottlers have operated for almost a century and in reliance upon which they have made enormous capital investments. They would preserve inter-brand competition, would give the most economical and environmentally-sound package (returnables) a chance to survive and would provide for the continued viability of the independent bottler.

I would be grateful if these comments could be made a part of the Record.

Thank you for letting me express them.

Very truly yours,

JOHN R. STRACHEN.

Coca-Cola Bottling Company of Taft, (Inc.), Taft, Calif., September 30, 1972.

Hon. PHILIP A. HART,

U.S. Senate, Washington, D.C.

Dear Senator Hart: Thank you for your letter of September 19, 1972, enclosing a letter to you from Jr. John R. Strachan of the Pepsi-Cola Bottlers Association.

I appreciate the opportunity to reply to Mr. Strachan.

Basically, there is only one point made by Mr. Strachan to which I wish to reply. Several times in his letter, Mr. Strachan refers to some "substitute system" which is proposed by people such as Messrs. Foster and Alden and by the FTC. Mr. Strachan questions the sincerity of my belief in this "substitute system" and indicates that the Pepsi-Cola Bottlers are unanimously against this system.

The only "substitute system" which I have ever advocated is the system which is known outside the softdrink business as free enterprise and competition. I want both the Senate and Mr. Strachan to know I am sincere and genuinely believe in the merits of the American system. It rewards efficiency, enterprise and

imagination and penalizes sloth and inefficiency.

I am not surprised that many of the Pepsi-Cola bottlers of this country are against this system. It is an unfortunate fact that altogether too many American businessmen pay lip service to free enterprise and competition but, when it comes to their own business, prefer the security and the fat profits offered by market division and price fixing. I have been told that the present hearings of your Subcommittee are not unique, and that your Subcommittee sees a steady parade of flag-waving American businessmen praising competition and asking that their particular business be exempted from the antitrust laws.

<sup>&</sup>lt;sup>4</sup> Mr. Meyer's speech is reported in full in the BNA Antitrust and Trade Regulation Reporter (\$ 22.72 at pp. D-1—D-3).

However, before too much weight is given to the so-called "unanimity" of bottlers, you should consider how many have actually remained silent and how many of them are exposed to subtle and not so subtle forms of "persuasion" by the syrup companies who have the power to cancel, or simply not renew, their franchises. When a man's business is subject to termination by a Pepsi-Cola, can his support of their position really be taken as part of a genuine unanimity? Would the syrup companies support legislation limiting terminations before allowing bottlers to vote their true feelings about territorial restrictions? The answers to these questions should help your Committee judge how sincere Mr. Strachan's letter really is.

The rest of Mr. Strachan's letter is merely his own opinion as to what would be the economic consequences if free enterprise and competition were ever allowed to exist in the soft drink industry. His letter is merely argumentative on these points. I gave my views on them earlier in my testimony before your Subcom-

mittee, so I will make no further reply to them in this letter.

Again, I would like to thank you for the opportunity to reply to Mr. Strachan, and I would appreciate it if you would make my reply a part of the record in these proceedings.

Very truly yours,

WILLIAM POPE FOSTER.

# EXCLUSIVE TERRITORIAL ALLOCATION LEGISLATION

### WEDNESDAY, AUGUST 8, 1972

U.S. SENATE, SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, COMMITTEE ON THE JUDICIARY, Washington, D.C.

The Subcommittee on Antitrust and Monopoly convened in room 2998, New Senate Office Building, at 8:30 a.m., Hon. Philip A. Hart, presiding.

Present: Senator Philip A. Hart, Senator Hiram L. Fong.

Staff present: Charles E. Bangert, general counsel; Peter M. Chumbris, chief minority counsel; Charles E. Kern II, minority counsel; and Dr. Arthur Andersen, Patricia Bario, editorial director, and Janice Williams, clerk.

Senator Hart. The committee will be in order, and we open this morning to have the testimony of Mr. Lucian Smith, who is with the

Coca-Cola Co.

Mr. Smith, as we did yesterday and should this morning, because of the business on the floor at this time of the Senate schedule, we are asking all our witnesses to do their best to limit their testimony to about 15 minutes.

The materials that are submitted in writing in the form of statements and documents will be printed in the record in full as if given.

We appreciate your willingness to get here early. Thank you.

## STATEMENT OF J. LUCIAN SMITH, PRESIDENT, COCA-COLA, U.S.A.

Mr. Smith. Thank you very much, Mr. Chairman.

First, let me say that I have with me Mr. Joseph Califano, who is our counsel, of the firm of Williams, Connolly & Califano.

It is a pleasure to accept the invitation of this committee to testify

on Senate bill 3133.

As president of Coca-Cola, U.S.A., which is the domestic soft drink division of the Coca-Cola Co., my purpose is to provide information and insights which we believe are significant to this committee in its study of the legislation before it.

The proposed legislation deals with licensing agreements which (a) grant to the licensee the exclusive right to manufacture, distribute, and sell trademarked food products in a defined geographical area. and (b) limit the licensee to the sale of such products only for ultimate resale to consumers within a defined geographical area.

The legislation is strongly supported by thousands of soft drink bottlers in this country, and the Coca-Cola Co., seconds their motion that the Congress enact this legislation. We agree with them that the legislation is in the public interest; that it is equitable to the independent bottlers of America; that it is in the interest of the American consumer; and that it is consistent with the spirit and purpose of the antitrust laws.

The Coca-Cola Co., produces syrups and concentrates for bottlers operating some 800 plants throughout the United States. Each of these bottlers is granted an exclusive right to bottle and sell Coca-Cola and our other soft drinks in a defined geographical area.

In accordance with our contracts, each bottler is authorized to use the trademarks owned by the Coca-Cola Co., and he may sell only

to meet the consumer demand within his defined area.

The company also sells fountain syrups to approximately 4,100 wholesalers across the United States. These wholesalers resell the syrup for use at retail outlets, where the product is mixed one drink at a time into the consumer beverage at the point of sale.

They compete without exclusive territories. These wholesalers are simply that. They do not perform production services in regard to fountain Coca-Cola syrup; they only sell to retailers the same syrup

they purchased from the Coca-Cola Co.

Of the 800 Coca-Cola bottling plants in the United States, 773 are independently owned and managed. They purchase their syrup from the company; they process that syrup into a finished product: they package it in their own containers: and they sell the packaged

product at prices that they themselves establish.

At the beginning of this century, 70 years ago, when few Americans had even heard of Coca-Cola, the means to induce bottlers to make the investments required to develop the demand for the product, and indeed, to produce it was to grant them the exclusive right to manufacture and sell the trademarked product within a defined geographical area.

Most of our competitors were later able to enter the soft drink business themselves because they could provide the same incentives to their bottlers.

Thousands of independent bottlers still rely on the exclusive territorial agreements in the continuing investment of their resources to remain in the business of manufacturing soft drinks. Indeed, many Coca-Cola bottlers have relied on this exclusive right for two and three generations.

In 1920, a Federal District Court examined the Coca-Cola bottler system in detail and found in the contracts—and I quote in part—"nothing having an effect or intended to have an effect to defeat or lessen competition \* \* \*, nor \* \* \* anything therein that may be said to be in unreasonable restraint of trade."

The local bottler system brings Coca-Cola into more than a million retail outlets located in 50,000 cities and counties in all 50 States. Most bottle Coca-Cola is sold in small stores and vending machines;

only one fifth is sold in chain food stores.

We believe the exclusive territory system provides the most economically efficient and socially desirable means of business operation for the manufacture and sale of soft drinks. It encourages a large number of locally owned, independent enterprises to perform the manufacturing and distribution functions which they are best able to perform.

This system balances decentralized ownership and local control with the efficiencies of centralized manufacture of the trademarked syrup. It results in the product being widely available to consumers everywhere

at economical prices.

In July 1971, the Federal Trade Commission brought an action against the Coca-Cola ('o. and other syrup manufacturers to eliminate, as an unfair method of competition, exclusive territorial provisions between the syrup manufacturers and the independent bottlers. That action had been proceeding in pre-hearing stages, but on August 3 we received from the Federal Trade Commission a motion for partial summary judgment claiming that the territorial provisions in the contracts are per se violations of the antitrust laws.

Soft drink bottlers are profoundly concerned that the Federal Trade Commission action would destroy their investments if the exclusive territorial arrangements under which many have operated for 70 years were eliminated. As a result and in response to their deep concern, Senator James O. Eastland, on behalf of himself and several other members of the Senate, introduced S. 3133, one of the bills now under study by this committee. That legislation would amend section 5 of the Federal Trade Commission Act to permit "the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture . . . distribution and sale of a trademarked food product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution and sale of such product only for ultimate resale to consumers within a defined geographic area. . . . ''

This amendment would apply only if three stringent conditions were

1. The product involved must be "in free and open competition with products of the same general class manufactured, distributed, and sold by others:"

2. The licensee must be "in free and open competition with vendors

of other products of the same general class;"

3. The licensor must retain "control over the nature and quality of such product in accordance with . . . the Trademark Act of 1946."

We feel that these conditions are meaningful in preserving antitrust law objectives. The legislation is phrased to preserve for the consumer the full benefits of the forces of vigorous interbrand competition which is present in the unique bottler system.

Like the Federal Trade Commission, the Coca-Cola Co. has as its objective the maintenance of a manufacturing and distribution system which results in the lowest possible prices to consumers of Coca-Cola. The lower the price to the consumer, the more Coca-Cola will be sold and the more syrup we will sell to bottlers.

We sell Coca-Cola syrup to bottlers at a fixed price per gallon which can be increased only if the price of sugar increases. The Coca-Cola Co. does not share in the revenues which an independent bottler

derives from increasing his prices.

Thus, our self-interest and the interest of our 65,000 stockholders coincide precisely with the interests of the American consumer and

the Federal Trade Commission: to maintain a system that produces

and distributes Coca-Cola at the lowest possible prices.

The American consumer can buy Coca-Cola today in our most economical packages at the same price that existed 70 years ago. The average current price per ounce of Cola-Cola when purchased in 16-ounce returnable bottles is the same as it was in 1900.

Coke sold in food stores in nonreturnable packages is priced, on the average, 30 to 40 percent higher than Coca-Cola in returnable bottles. The difference lies essentially in the different costs of the packaging: The cost of returnables is spread over many uses; the cost of the non-

returnable package is absorbed in one use.

The American consumer recognizes the significant savings from returnables, as evidenced by the fact that 60 percent of Coca-Cola is purchased in returnable bottles. Returnable bottles offer the best value to the consumer, and returnable bottles provide the most ecologically sound method of distributing soft drinks. These bottles significantly alleviate the solid waste disposal problems of thousands of communities across the Nation.

Exclusive territories are virtually essential to the preservation of the returnable bottle system. The deposit a bottler receives on returnables is less than the cost of the container. Therefore, unless it can be recovered for repeated uses, it cannot remain as the economy

Indeed, a bottler would certainly not invest in expensive assets, which returnable bottles are, without some assurance that the value of the asset will be realized by his business. Without an exclusive ter-

ritory, he can never have such assurance.

Those who advocate the use of centralized food store warehousing of soft drinks ignore the fact that the returnable containers are not compatible with this system. Most food chains have not chosen to put returnable bottles through their warehouses. We know of no instances in which chains have accepted Coca-Cola in returnable bottles for warehouse delivery. We do know that only 6 percent of chain privatelabel soft drink sales, which are handled through a central warehouse system, are in returnable bottles.

To the extent that the committee finds low consumer prices and ecological considerations relevant and recognizes the undisputed fact that returnable containers further both of these objectives, then we hope it will also recognize that exclusive territorial arrangements are essential

to the achievement of these objectives.

The visible equity of the Coca-Cola bottler is the plant and equipment in which he has invested his resources and often his life's work. But the critical equity of the Coca-Cola bottler whose contract is in perpetuity is the exclusive franchise he has to manufacture and sell Coca-Cola in a defined geographical area. This right motivates him to years of work to build goodwill for his product.

Under the existing system, if it becomes inefficient or unprofitable for a bottler to continue to serve his area, or when members of a family decide that they no longer wish to remain in the bottling business, they can sell their franchise, as well as their plant and equipment.

Thus, they receive an equitable amount for the investment of their carnings and their labor. If the territorial provisions were lifted, many of these bottlers would be wiped out without receiving anything in return for their life's work and their family's investment.

The Coca-Cola Co. recognized that improved transportation, changes in communications systems, economies of scale, shifting population concentrations, and changing tastes and income patterns have tended to reduce the number of bottling plants and increase the size of some

We expect that this trend will continue over the next few years, but the elimination of exclusive territories would accelerate the reduction in the number of bottlers to a fraction of the number that would otherwise exist under the present system. We do not see how the remedy proposed by the Federal Trade Commission could prevent hundreds of bottlers from being forced out of business.

Some have concluded that bottlers are going out of business at such a rapid rate that this industry will inevitably end up with a few large bottlers, and that the elimination of exclusive territorial arrangements would not affect this trend. But their conclusion is not consistent with either our experience or our expectations.

We believe that there are distinct business and social advantages to having a large number of independent Coca-Cola bottlers. Our business has been built and to a large extent flourishes as a result of the efforts of hundreds of independent businessmen, each intimately familiar with his local market, each highly motivated to serve the consumers in his market. We would like to keep as many of our lo-

cal bottlers as possible.

In some cases where bottlers were too small to operate efficiently or unable to make necessary investments in plant and equipment, we have recommended to these bottlers that they merge or consolidate their production with another bottler. Sometimes they have followed our advice, and sometimes they have not. They are independent businessmen with contracts which, in most cases, run in perpetuity; and they make their own decisions.

They base these decisions upon their estimates as to which course of action will most enhance their business. Usually a bottler can afford to pay his neighboring bottler a generous price for his territory, because savings can be effected through production consolidation.

Thus, the bottler who sells his plant is usually assured that he will receive a fair and equitable compensation for the investment

he has made in developing his territory.

In the absence of exclusive territories, there would be little incentive for a neighbor to pay for something he could take for

nothing.

It has been stated that the Coca-Cola Co. has plans to reduce the number of bottlers to 78. This is not true. Our position is, and always has been, that the system functions in the best interest of the consumer when there are a large number of bottlers, each with an

intimate knowledge of his local market.

In 1967, it appeared to us that, with the growth in the use of cans and nonreturnable bottles, the industry was moving in the direction of larger volume, high-speed production centers. Many bottlers were faced with the difficult decision of whether to invest in these new facilities individually, or to consolidate with neighbors either through production co-ops or mergers.

It was obvious to everyone that not all bottlers could afford these plants. It was also obvious that some rational roadmap was required so that the new production centers would be set up in an optimum configuration in terms of number, investment, and location in order to

minimize production and transportation costs.

Accordingly, in 1968, we conducted a computer study to determine the theoretical optimum number and location of large production centers for cans and certain nonreturnable packages. The results of this study were then tempered by management judgment and, in 1969, translated into a map.

The map was literally that—a guide. If several bottlers expressed an interest in consolidating production facilities or forming a can co-op or merging, we had a roadmap we could use to suggest to them

where that production center could be built.

Although we knew that the production of returnable bottles and many nonreturnable packages would remain highly decentralized for years and perhaps forever, we also knew that production of some packages, such as cans, had to be centralized in large-scale production centers.

The much referred to number of 78 came from our map which indicated that by 1980 some 78 such centralized canning and nonreturnable bottle production centers could be required if the consumer demand

for these packages continued to grow.

It had nothing to do with the number of bottlers. Indeed, as I have said, we have always felt that our system functions best with a large

number of bottlers.

We would like to point out that our projections in 1967 were based on an increasing trend at that time toward nonreturnable containers for soft drinks. However, there has recently been a resurgence in the demand for returnable packages, and there is reason to believe that the returnable share of the total market may have stabilized.

In any event, the assumptions which formed the basis for our 1967

computation are no longer valid today.

If territorial exclusivity is eliminated, the result will inevitably be the forced concentration of the bottling industry in the hands of a few bottlers. We cannot predict which bottlers would survive and which would perish. But we can predict that many would perish and few would survive.

We believe the challenge to the competitive free enterprise system in the 20th century is to develop an industrial structure that performs with the efficiencies of national operations, but which at the same time permits local businesses on a smaller scale to participate sig-

nificantly in the system and in the profit.

This is the essence of the principle of participatory economics which has guided the Coca-Cola Co. for over 70 years. It is our conviction that, ideally, competitive capitalism should be as decentralized as possible in terms of ownership and operation, consistent with efficiency that provides low prices to the American consumer.

We believe that the bottler exclusive franchise system represents exactly that kind of organization, and is unique in American business.

Whereas most trademarked products distributed on a large scale are the products of single large manufacturers who manage and control the brand centrally, our system offers the advantages of decentralized production, sales, and control of the finished products by a large number of local businesses.

We believe that this business structure serves to meet the objectives of the antitrust laws, and is the principal reason our business has flourished for 70 years in a highly and increasingly competitive market.

Today, we have attempted to give this committee the best judgment of the Coca-Cola Co. on the issues before it. We recognize that the issues are complex economically, socially, and politically. That is pre-

cisely why they should be resolved in the legislative arena.

The Supreme Court has explicitly recognized the Congress as the appropriate forum for the discussion and resolution of such issues. In the recent *Topco* decision, while the majority, concurring, and dissenting opinions disagreed on the issue of territorial provisions, these common threads were expressed in all three opinions:

First, the limited capability of courts fairly to resolve difficult economic problems; second, the resort to per se rules in the face of such difficulties; and, third and most importantly, the plea to the Congress to take whatever legislative action that was in the public interest.

All Justices agreed that the Congress is uniquely equipped to identify not only those business practices whose merits can not be appropriately tested in the courtroom, but also those practices which cannot be governed by automatic and inflexible rules.

Coca-Cola is sold by bottlers of every size in every corner of America. The operations of these bottlers vary in size and scope of territory, and

in the mix of products they manufacture and distribute.

But the overwhelming majority of these bottlers have one common and persistent theme in their conversations with the Coca-Cola Co.: The system of exclusive territories is essential if they are to continue to provide the American people, over the long run, a quality product at a low cost and permit the economic forces of this Nation to operate fairly.

That is why we second the motion of the bottlers in favor of this legislation. We believe that is why 41 U.S. Senators and 184 Members of the U.S. House of Representatives have introduced this legislation.

Thank you very much, Mr. Chairman.

Senator HART. Thank you very much, Mr. Smith. Your statement is responsive and helpful. I could pretend to have a depth of knowledge about the subject by reading some questions that the staff has developed, but I think I am honestly compelled to let the staff ask them because they developed them.

I am, and I am sure anyone in the room who heard it who was not familiar with the business, was struck by the points you make at the

top of page 7.

I can buy Coca-Cola today in the most economic package at the same price that I could have bought it 70 years ago. There may be products that can make that claim in addition to Coca-Cola, but I think that none of them are on my shopping list anyway. It is remarkable.

Mr. Smith. We agree with that, Mr. Chairman.

Senator Hart. Seriously, do you know of any other product on the shelves today that goes at the same price it did 70 years ago?

Mr. SMITH. No, sir; I do not. Senator HART. Mr. Bangert?

Mr. Bangert. Mr. Smith, running throughout your testimony, as well as testimony that we heard yesterday, is the plea that this legisla-

tion is needed to protect the small, independent businessman; and yet. in rough calculations the staff has done, we have attempted to put on the map over there, it would indicate that Coca-Cola's top 10 bottlers. plus Mr. Rainwater's operation—and Mr. Rainwater was in testifying vesterday, and that is the reason we have him on there—plus Coca-Cola's subsidiaries, controlled exclusive territories that account for approximately one-half or a little less than one-half of the population of the country.

Now, if legislation is to be passed, do you think it should apply to those types of organizations that certainly are not small business in the

Mr. Smith. We are terribly concerned about the equity of the people who have built those businesses over these long period of years, and who have operated them in the belief that they were operating them under legal provisions, both because of the court ruling in 1920 and the fact that nothing had happened in the intervening period to indicate that they were not legal.

I would have to say that it is clear to us that anything other than legislation applying to all would result in a much accelerated diminution of the number of bottlers, and a much accelerated concentration

into the hands of a few.

I hope I have been responsive to your question.

Mr. Bangert. The Federal Trade Commission, in their proposed settlement, has a plan which, as I understand it, would require large franchisers that are located in, I believe, the top 20 metropolitan areas to stay within those areas, and not raid out into the neighboring territories of the small franchisees. But, at the same time, it would permit the small franchisees to sell wherever they want to, either in competition with other small franchisees or in competition with the big metropolitan bottlers.

Mr. Smith. Yes, sir.

Mr. Bangert. Do you think this is a possible solution to the problem? Mr. Smith. Mr. Bangert, we had an opportunity to review that document fairly well before these meetings.

We cannot see how they can, in any way, approach a solution to the problem, if indeed there is one. It is a highly theoretical approach to

solving a real-world kind of situation, as we view it.

Maybe I can tick off a few of the consequences as we can perceive them. Firstly, visualize any one of the 200 bottlers or whatever number of bottlers it turns out to be under that formula; visualize the business that is set up with thousands of employees, heavy dollar investment, and many stockholders in most cases, built upon a certain

volume of business.

The price structure in that enterprise is built upon those investments, those employees, and that volume of business. Now, visualize the consequence to that industry when as a result of the proposed the FTC's proposal, neighboring bottlers, with no investment in that enterprise, that large plant enterprise, begin to sell in all probability only to the largest volume outlets in that large plant territory, because they are the ones that would be susceptible to warehouse delivery, and in all probability in one-way containers only, because they are the only ones compatible with warehouse distribution systems, and at prices which do not encompass any of the costs required for a full-service bottler operation for all kinds of packages and all kinds of retail outlets.

Now, visualize it yourself, looking at that kind of a criteria. It seems to us what will happen is that the can, because of its lower price as a consequence of that way of sort of pirating the cream of the market, would force a much faster transition from returnables to one-way containers.

The ultimate consequence would be the need for the bottler in the big market to increase further his prices on the returnable container in order to stay in business. And, therefore, you would have an accelerating trend toward the one-way container in the large plants

and large outlets in that big-plant territory.

The consequence of that to that business, to its employees, and to its stockholders and to the consuming public ultimately would be

very negative, as we view it.

Add to that the following consideration: Visualize any metropolitan market with which you are familiar, and consider the kind of distribution facilities that exist there for food stores, and visualize a neighboring small bottler selling at low prices, one-way containers for warehouse distribution in that large market.

The goods they sell migrate back out from that big market into little towns all around it. The number of small Coca-Cola bottlers in that periphery is quite large. So they would begin to lose their business as a consequence of a neighboring small bottler having sold into the metropolitan market for retransmission into the suburbs.

Those are two of the reasons that quickly come to our mind as to why this would be a self-defeating program and, in our judgment, would greatly accelerate the trend toward centralization of the busi-

ness into the hands of a very few.

Mr. Bangert. Well, I am wondering whether or not the technology

of the business isn't such that the trend is there to begin with.

For instance, in some documents that you were kind enough to furnish to the subcommittee, it appears that your company feels that the minimum profitable production operation now is 1 million cases per year. This document also talks about Glass Containers Manufacturing Institute, working with Coke, to test a new filler which, running at only 85 percent of capacity, as I understand it, will produce 8 million cases of 10-ounce, one-way bottles a year.

Now, with that type of technology, what do you see of the future

for the small bottler?

Mr. Smith. Mr. Bangert, as I indicated in my testimony, we foresee that the competitive forces which are now very actively at work will tend to force a further centralization for a while.

I would have to say that we believe that the continuation of the exclusive franchise system, for the reasons I have given, would have

a strong tendency to reduce the degree of that concentration.

Put the other way: If those exclusive rights are denied to bottlers, it will inevitably produce a very fast concentration into a relatively few hands.

I believe it appropriate for me to remark that I am aware of the source of that number of 1 million. Without any intention of saying anything negative about the fellow who made that statement. I would have to point out—and I am quite certain that if you talked with any

number of our bottlers, including Mr. Rainwater, you would find that sometimes when a fellow is making a speech, he is tending to deal in broad averages that do have meaning in communicating a general premise; but when it comes to applying them in a given market situ-

ation, the premises may or may not be true.

For example, I know bottlers whose business is predominantly in returnable packages, who sell very many fewer than a million cases, who make a very satisfactory profit. My guess is that there are quite a number of those who, for one reason or another—not the least of which is his own ingenuity-will continue to be able to refute the averages which both technology and competitive forces will bring about.

Mr. Chumbris. Mr. Bangert, would you yield so we do not get away from the point on whether the statute should limit the application of

the exclusivity to only the small bottlers?

Let us say, for example, we know that in certain industries, the Department of Justice or the Federal Trade Commission would say we would not allow any mergers in the top eight companies, but between nine and 20 there can be mergers. So they permit a merger between No. 17 and No. 10, and by that merger they will shoot in to become No. 6, so they change position.

Now, let us assume that we pass that law which said that only the small bottler would be permitted to have exclusivity and he would be able to invade the big bottler, but the big bottler could not move into

his territory.

We would have some problems there because, let us say, we get to that borderline where there is the line of demarcation between big and small, and some of the small move into the big. The first thing you know, the small becomes within the big category; and the one who was in the big category, he moves into small and he gets the exclusivity.

Well, who keeps score when you get to that particular point? Who is going to referee when you move from small into big and from big into small, and whether you have exclusivity or do not have exclusivity?

Those are some of the problems I think would be hard for Congress to deal with on the bill or the agency who may be charged with the responsibility of refereeing that particular point. Would you wish to comment on that?

Mr. Smith. Only to agree with it most enthusiastically, Mr. Chum-

It is our view that if exclusive territorial provisions are denied and if the relief proposed by the Federal Trade Commission is activated, that the theoretical computer map that was made will come about at a very rapid rate; that it will not effectively at all reduce the concentration, but it will speed it up.

Mr. Chumbris. For example, I notice in the population statistics, what were always the big 10 cities of the United States, I think, in the big 10, one city which was about eighth about 20 or 25 years ago, has

dropped down to the top 20.

Now, let us say there was a bottler in that particular area 20 years ago, and he was a top bottler because he had a metropolitan area. Suddenly, because people are moving to suburbs or situations like that, like Baltimore and Washington become one city and Columbia might be the big center of population, whoever had a bottling plant in Columbia would probably outgross maybe the one who was covering the

Washington area.

So you have all of these problems that make it difficult if you are going to pass a bill, whether you can divide it between the big ones not to have the exclusivity, but only the small ones.

Mr. Smith. Yes, sir; I certainly agree with that.

Mr. Bangert. Getting back to the survival of the small bottler, in a memorandum of the Coca-Cola's Bottlers Consolidation Department, dated October 30, 1967, from George Overend III to J. W. Wimberly, he comments on this. He says:

Conditioning of the bottlers over a long period of time is very critical. This conditioning involves educating them to one single principle: A small plant cannot survive in the long run, and consequently, the value of that investment relative to alternative uses of funds is declining day by day. Giving up one's business can never be pleasant, but it can be more palatable for the bottler if he has had a period of time to adjust to the inevitable.

Now, I am wondering whether the author of that memorandum, Mr. Overend, at least in 1967, did not feel that the demise of the small bottler was inevitable.

Mr. Smith. Mr. Bangert, I suppose that the definition of "small"

gets in the way of clear communication about it.

After looking through quite a few of those documents that we submitted to you, I wrote a comment that, with your permission, I would like to read, because I believe it is significant to your full understanding of what we are trying to do at the Coca-Cola Co.

There has been a great deal of discussion in the trade press about the Coca-Cola Bottlers Consolidation Department, of which Mr. Overend was one of two members, and about an alleged plan to reduce

the number of bottle production centers to 78.

Virtually without exception, these activities have been misrepresented in the trade press. Fortunately, they are well understood by our bottlers.

The document to which you refer my attention is one of several written by staff engaged in bottler consolidation activities. It is important that this committee understand what our activities in this area have been.

During the 1960's, we became increasingly concerned about the economic viability of our smaller bottlers. When they began to get in trouble financially, they became less competitive. They had to raise prices or reduce services, or inevitably become less competitive.

The consequence was increasing prices or reducing service, one or the other. We were concerned, therefore, about the longrum outcome for that bottler himself; we were concerned about what was happening to our product with the consumers in his market; and we were concerned about what was happening to us.

As a result, in the interest of our bottlers and ourselves, we conducted the theoretical computer study to which I have already referred.

Our concern about the economic viability of our smallest bottlers was, again, confirmed by this study. As a result, we created in 1970 the bottler consolidation department, one of whose members you are now quoting.

The purpose of that department, clearly, was to assist our bottlers in facing the economic realities of the need for mergers or consolidation of producing facilities, or taking whatever other action would protect, to the greatest extent possible, their equity and their ability

to stay in the business.

We have furnished this committee with many documents dealing with the activities of that department as seen through the eyes of a staff member. However, inartfully they worded these documents, it is important that this committee understand that our activities were designed to support our bottlers, just as we are here today doing the same thing.

We felt it incumbent upon the company to explain the facts of life,

if you will, to tell it to them like it was.

There is no question in our mind that the small bottlers will continue to consolidate over the next several years, if they are to respond to the competitive forces that are working in a changing America.

It is our intention, consistent with the antitrust laws, to give them whatever assistance we can in protecting their equity and making them

viable in the soft drink markets of the 1970's and the 1980's.

Our 70 years of success as a major U.S. company is based on the mutual trust that exists between our bottlers and ourselves. And I believe that virtually every Coca-Cola bottler would agree with that statement.

I think you would also be interested in putting all those documents in perspective—that if one were to judge the effectiveness of that two-man department by the number of mergers that happened, you would be interested to know that for the 2 years that it was in existence there were fewer mergers than the 2 years prior to its existence.

Mr. BANGERT. How many were there, Mr. Smith?

Mr. SMITH. I do not have the number at hand, Mr. Bangert, but I can get it for you. I would be glad to give it to you.

Mr. BANGERT. Would you provide that for the record?

Mr. Smith. I think we have submitted them in total, but not by year. I am not sure.

Senator Hart. We will make that a part of the record.

(The letter referred to follows:)

WILLIAMS, CONNOLLY & CALIFANO, Washington, D.C., August 22, 1972.

CHARLES E. BANGERT, Esq.,

General Counsel, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Mr. Bangert: In response to your question to Mr. J. Lucian Smith. President of Coca-Cola U.S.A., during the Subcommittee's recent hearings on Soft Drink Distributors' Legislation, I am pleased to enclose the following information for insertion at page 162 of the hearing transcript.

Please let me know if we can be of further assistance.

Sincerely,

JOHN G. KESTER.

The number of Coca-Cola bottling plant mergers for the past four years was as follows:

1968	95	1970	90
1308	<u>_</u> )	1970	
1969	9.1	1971	96
139(33)	07	1011	

The Bottler Consolidations Department of Coca-Cola U.S.A. was in operation from January 1, 1970 until about the latter half of 1971. During 1970 and 1971 there were 48 mergers as compared with 59 mergers in the prior two years.

Mr. Bangert. Let me just pursue this a little further and see how effective, I guess, that staff was.

As late as June 2, 1971, Mr. Trippe of the bottlers consolidation department wrote to Mr. Richard D. Harvey. As I understand, Mr. Harvey is a vice president of the company; is that correct?

Mr. Smith. Yes, sir.

Mr. BANGERT. The following:

There is a disturbing lack of activity among independent bottlers in the area of mergers and acquisitions at the present time. We feel there is a great need for the company, through its domestic bottling subsidiaries, to demonstrate leadership that will encourage the independent bottlers to become more active.

A preliminary proposal for acquisition of Muskegon, Rockfield and Madison with funds obtained from a divestiture of Toledo was prepared for consideration

of management.

Now, I guess what I am wondering is what did top management decide on that particular situation?

Mr. Smith. Frankly, I cannot be entirely responsive, Mr. Bangert,

but I can in principle, I think.

We had quite a long time ago made a corporate management decision that the Coca-Cola Co. did not want to own any more bottling plants. We felt that the size of our involvement in the bottling busi-

ness was adequate for our purposes.

Therefore, we concluded that if at any time, consistent with putting together a logical natural marketing area as a result of the changes that are going on in the whole economy, as you well know, and if that produced a need to acquire a plant in the immediate vicinity of one of our bottling companies, that we would not make that acquisition, even though it was consistent with rounding out a natural marketing area unless at the same time we sold another one, the sale of which would produce another viable, natural market.

That was the logic that was being referred to there. The fact is, we

did not act on that recommendation.

Again, I do not want to do damage to anyone, but you might like to know that that document was written at a time when we were in the midst of a reorganization, as a consequence of which that department was discontinued.

Mr. Bangert, Well, in April 1971 in another document from Trippe to Harvey, talking about consolidation efforts, he said:

Participated in meeting with J. Lucian Smith to plan how the meeting with . Bill Williams and Jim Hayes, scheduled for April 1, would be handled.

Now, as I understand it, Bill Williams is president of Akron Coke. Mr. Smith. Yes, sir; I believe so.

Mr. Bangert. And I may be wrong, but I am under the impression that they are active in attempting to merge various companies.

Mr. Smith. Yes, sir; I believe you are right.

Mr. Bangert, Well, do you remember what this meeting was about and who Jim Hayes was and what the outcome of it was?

Mr. Smith. I believe I do, Mr. Bangert.

Mr. Hayes, I think, is a sales manager of Mr. Williams' company. At least he is a part of the management of that company, and I think he is the No. 2 man in it.

They came to see us in an interest in buying our bottling company at Columbus, Ohio. We told them that we were not interested in selling any of our plants at the moment, because of the proceedings at the Federal Trade Commission. As my memory is, that was the conclusion of that conversation.

Mr. Bangert. Just a couple more questions in this area.

Apparently, in 1970, there were 872 operating bottling plants, and by the end of that year, again Mr. Trippe indicates in a memorandum to Mr. Harvey, that this figure was reduced to 840 or 32 less than the beginning figure. And then it says:

We should make more effective use of our policy of encouragement and discouragement.

I am wondering if you know what he means by encouragement and discouragement. I also wonder if you have the trend of reduction of plants, whether it is through merger or going out of business or whatever it is, for the last few years.

Mr. Smith. I appreciate that question and I would like to speak to

that. Mr. Bangert.

I do not have the count for 1970. If it is significant for you to have it by years, I will be glad to supply it. I have the following numbers though:

In 1961, there were 1,039 bottling plants in the United States. In

1971, that number was 800.

Now, in order to be sure and consider that number in its right meaning, it is important for you to know that the majority of those changes involved either a bottler closing one or more of the smaller plants which he owned in his territory, to consolidate his production facilities and reduce his costs, or situations in which the purchaser and seller already had somee form of common ownership.

In other words, that reduction from 1,039 to 800 in 1971 was over half accounted for the reasons I just stated. During that period there were fewer than 100 bottlers who actually got out of the business by

means of selling.

Have I responded to your question?

Mr. Bangert. Yes. I think that clears it up.

Mr. Smith. In other words, from 1961 to 1971, in that 10 year period, we went from 1,039 bottlers to 800 bottlers, over half of which shrinkage resulted from an independent entrepreneur closing one or two of his production plants to consolidate into one, or common ownership companies getting together for common production facilities.

Mr. Chumbris. You said 100 dropped out?

Mr. Smith. Of that shrinkage, less than 100 actually left the business.

Mr. Chumbris. And for what reason?

Mr. Smith. These were consolidations that happened for whatever reason happens to pertain—either they wanted to get out of the business or the profits were not satisfactory, and they thought they could merge and end up with a better operation.

Mr. Bangert. Well, then on the other half of that question, do you know what he meant when he talked about encouragement and dis-

couragement!

Mr. Smith. I can only guess, Mr. Bangert, but I would be glad to try

and guess.

As I hope I have made clear, we found ourselves at a time, about the 1960's, late 1960's, when there was a great deal of merging activity happening on an uncontrolled kind of a basis. I say uncontrolled, meaning there was no system about how two bottlers might end up getting together to merge, or, indeed, some bottler selling out to another bottler so that you had one inefficient operation succeeded by an-

other inefficient operation.

As a consequence, we set up this consolidation department, so that when bottlers came to us and said, "We are thinking about selling or merging or something," we could have a facility and a roadmap which they and we could look at jointly and decide how to proceed with these mergers.

Now, that was our policy of encouragement. I believe that is prob-

ably what he had in mind.

Mr. Chumbris. If Mr. Bangert will yield just one second. I think that our subcommittee, of course, has been studying mergers and consolidations for the last 15 years. In other industries the reduction of private business people has been fantastic.

If you can take your figures of 1.039 and over 100 of them were people just improving their operation by making a larger unit and consolidating, and you only have 100 unaccounted for, that is 10

percent.

Mr. Smith. Yes, sir.

Mr. Chumbris. And we have heard instances, for instance, in the butter and egg fields and the ice cream dairies and in the butter field, between 1961 and 1971 the mergers in those industries were fantastically—even greater than 50 percent in some of the industries we have studied up here.

So the record for your particular industry is remarkably low as far

as a merger movement.

And if you have any statistics that you would like to put into the record to compare your industries with some of the others, we will welcome them for the record.

Mr. Smith. Thank you, Mr. Chumbris. I really do not have any,

other than those we have presented.

I further state that we have a strong interest in having the maximum number of bottlers that we can have, consistent with the objective of having efficient operations with consequent low prices to consumers.

Mr. Bangert. Just one more question in the area of encouragement and discouragement. Let me preface the question by indicating that you, as president of the company, I know cannot control every district manager or everyone else you have.

But seeing what appears to be a report of activity and certain names are blanked out so that the parties will not be identified, the following

is found:

"Blank" shareholder unrest, which I am proud to have helped create, continues, "Blank" wants to merge now, and hopes the deal with "Blank" will go through. I have not pushed at all, for obvious reasons. For the record, "Blank" is very much on our side, but "Blank" surprisingly enough calls the shots with the stockholders.

Would spreading stockholder unrest be a means of encouragement and discouragement, do you suppose?

Mr. Smith. I appreciate that. Let me say flatly and unequivocably

that is not our method of doing business.

I am familiar with the specific situation to which you refer. The language is about as untypical of what really happened as you can imagine.

The number of stockholders was either three or four. They were, in a couple of cases, daughters of the owner; and in one case, an in-law of the former owner. The stock was in an estate.

What actually did happen was that an analysis of what was going on in the business was made and shown to those people. In other words, a presentation of the facts about the market as we saw them.

My memory is not clear, but I do not really think it resulted in

their doing what we were proposing for them to do.

Specifically, I would like to clarify, Mr. Bangert, that is not part of our method of doing business. I believe that if you would talk with a few Coca-Cola bottlers, you would find that that is not typical of our way of doing business.

At any time, when we do not operate and counsel in a way that is clear to the bottlers to be in his own self-interest, he is pretty able

to recognize that and not follow our recommendations.

Mr. Bangert. In your statement and in the affidavit that you gave in the Taft Coca-Cola matter, you express in your view that without territorial protection the large bottlers can drive the small bottlers out; that with the small or medium-sized bottlers forced out of business, larger bottlers would then be free to raise their prices. The result would be fewer larger bottlers, less subject to the discipline of competition; and that, generally, the consumer would be worse off.

Yet we heard that interbrand competition is very important in this business. I am wondering how you weigh those two things—the importance of interbrand competition as a means of controlling Coca-

Cola's price, for instance?

Mr. Smith. I hope I understand the question clearly, Mr. Bangert.

If I am not responsive, I hope you will interrupt me.

You see, it is our view that the Coca-Cola bottler system is one in which he is the manufacturer of the finished product; and that the role of a brand is at the manufacturer level to be highly competitive with other brands in its category at the manufacturer level; and that, indeed, the present situation in the soft drink business is one in which there is a very high degree of competition between brands at the manufacturer level.

Indeed, that is a large part of the reason for the need for merger. It might be useful if I commented about one particular situation, in

South Carolina. You have probably noticed a good deal of reference to South Carolina. As a point in time—my memory cannot quickly tell you exactly when, but I think it was in the late 1960's—the situation in that market was that there were twice as many Coca-Cola bottlers in South Carolina as there were Pepsi-Cola bottlers. But those fewer Pepsi-Cola bottlers each did more business than our larger number of Coca-Cola bottlers.

They found themselves in a very noncompetitive environment, if I make a clear point. Those bottlers actually came to us and said, you know, "We have got this problem. Help us do something about it."

So we did start conversations with them aimed at reducing the number of Coca-Cola bottlers in that State in order to let them achieve the efficiency of higher volume, so that they could be more competitive

with the opposite brand, Pepsi-Cola.

In other words, the only point I am trying to make to you is that all of what we have been doing has as its end purpose the idea of becoming more competitive interbrand, not less competitive.

If there is more on that—I hope I have been responsive to you,

Sir.

Mr. Bangert. Yes, I guess the problem that we have is that you have to be big enough to take advantage of technologies, economies of scale, that type of thing. But yet, on the other hand, you caution us that if you get too big, the consumer is liable to suffer in the process.

Where is the in between? Where are you big enough that you can take advantage of the technologies and pass those cost savings on to the consumer? And when are you so big that you run the risk of hav-

ing monopolistic pricing?

Mr. Smith. I do not know the magic answer to that question. My response is that our conviction is the maintenance of exclusive territorial boundaries will keep the maximum—indeed, the word might better be "optimum"—number of independent bottlers per brand in business on a basis which will enable them to be highly competitive; and that the removal of those territorial restrictions will have exactly

the opposite effect.

Mr. Chumbris. If I may interject, Mr. Smith, if, for example, Coca-Cola or Pepsi-Cola, Seven-Up, et cetera, got to the point Mr. Bangert just mentioned—so big that the consumer would be hurt by it—would that not give the chainstore brand opportunity to step right in if his price is going to the point where you cannot have that spread go too big, because that is a problem we had in the bread hearings back in 1958, when the chains started putting out their bread for 3 cents less than the big brands. The minute they got beyond that 3 cents, why they just lost the business, and the consumer went to the chainstore bread.

Mr. Smith. That is, indeed, true, Mr. Chumbris. And it happens in the soft drink business all the time. At the very minute a void is created from excessively high pricing or whatever in any market, the

competition is very quick to move right in.

Mr. Chumbris. And we found it in the gasoline stores. The minute that spread gets over two, maybe three, sometimes as high as five cents, they go right to the low-priced gas.

Mr. Smith. That is right.

Mr. Bangert. Just one more question in this area. Again, in terms of trying to determine what the optimal size is, we get to what size does not result in concentration and hurts the consumer.

In the memorandum dated November 3, 1970, to Mr. Harvey, the

following is found:

Participated in an orientation program that Homer Burrous arranged with Bill Hugli of the Stroh Organization. We found Mr. Hugli apparently in agreement with our recommendation that Stroh's next step should be to try to acquire the four Detroit subs, plus Port Huron.

If they are successful, we will then negotiate with him to sell Flint and Bay City to Stroh. This would give Stroh ownership of the entire Detroit production

center and marketing area in our long range plans.

Having accomplished this, we would then consider negotating with Stroh with a view toward selling them the balance of the Michigan company.

I do not know whether that was successfully put through or not, but if it was, is that the type of size that you are getting into that worries you?

Mr. Smith. Mr. Bangert, the situation you are referring to did not come about. I would like to be as cautious as I can, because this is a

specific kind of a situation.

In the Lower Peninsula of Michigan, there is one Pepsi-Cola bottler. Our bottlers find themselves in that kind of a competitive environment.

With the objective of becoming more competitive—that is, being able to be more competitive in the Lower Peninsula of Michigan conversations have been going on for some time about how to get those efficiencies into the Coca-Cola business.

Now, the people who formerly owned the Coca-Cola Bottling Co. of Detroit, a family by the name of Young, for reasons of their own decided to sell their business, the Coca-Cola Bottling Co. of Detroit;

and they sold it to the Stroh family.

When the Strohs were negotiating with them to buy it, they recognized the competitive imbalance, and they began talking with us about our attitude toward their buying other bottlers in Michigan in order

for them to become more competitive.

Now, there is an institution in the business called a subbottler. I am not sure whether that has come to your attention before. It simply means that a bottler, usually long years ago, sublet part of his territory to another bottler. The first bottler—we call him a firstline bottler buys his syrup from us, resells it to the man to whom he sublets his territory at a higher price.

Now, there was a time when that was a useful thing in the business. It is not now, and our program has been designed to try to get rid of that kind of subbottler. All those that we owned ourselves we sold the

first line rights to those subbottlers.

We said to Mr. Stroh, "When you bought the Detroit Coca-Cola Bottling Co., along with it you bought the firstline rights to some subbottlers, and I believe that memorandum lists the names of them.

We said, "We think your first move should be either to sell those fellows their own firstline rights so that they can become more effective, or to work out an arrangement with them whereby you acquire them, so that that inefficiency which happens because of the increased price can be eliminated.

We said, "Once you have done that, if the resulting economics seem to indicate that you ought to have more in order to become more

competitive, we will then talk with you."

Now, in principal, that is what that document is saying.

Mr. Bangert. Well, that makes sense. I can understand that you would want to put together something big enough so that you could take advantage, again, of efficiencies and technologies, because you bring your production costs down, and obviously the consumer is going to be better off and the competition is going to be better off.

I am not saying that Coke USA has had anything to do with this. but it just occurs to me that New York Coke, as I understand, has

made acquisitions in Connecticut and Puerto Rico.

Now, how does that help efficiencies! How does that help competition!

Mr. Smith. Well, you know, if an owner in one geographic place invests in a business in a different geographic place, in a situation wherein the two are not going to be put together as one entity, the questions, as we view them, are: The competency of the man who bought the business, the financial arrangement by which he bought it, the funding that he puts into it, and how well run a business it is going to be.

In other words, it is not bringing together of the different components of a particular market, as I heard your description about the Puerto Rican situation. It is simply an investment by some people who know the business in a remote geographic area. If they bring good competence to that market—in the case of Puerto Rico, they did indeed—the consequence is that Coca-Cola becomes very much

more competitive, if I am responsive to you.

Now, when the bottlers acquire neighboring territories—I am frankly not familiar with the details of the situation you referred to, but I know that, in fact, Coca-Cola bottlers who own their own business and own them in perpetuity, that when they sit and talk with each other, they are not going to merge unless the consequence is a business that can be more competitive.

If you want to ask any more questions, I will be glad to try and answer them, because I think it is—in other words, they do not do that if the consequence of it isn't some improvement to their ability

to do business.

Mr. Bangert. Let me pursue that just a little further.

In this context, yesterday we had Mr. Fester from Taft, Calif., as a witness.

Now, his story was that he had a company that was willing to build a warehouse in his territory, and he could sell to that warehouse; and the warehouse, in turn, shipped into Los Angeles for a price, I believe, in the neighborhood of 20 or 30 cents a case cheaper than the Los Angeles company was selling in that area.

Now, would not competition be better off if Mr. Foster could continue selling into Los Angeles competitively, rather than having Los

Angeles, for instance, acquire Mr. Foster's territory?

Mr. Smith. Well, in our judgment, Mr. Bangert, in the short run, with one classification of outlet and one classification of container.

the consumer could benefit.

In the long run, in our judgment, the consumer would not benefit, because the effect would be to reduce the number of bottlers further and to increase the price because of the more rapid conversion from returnable packages to one-way packages.

Mr. Bangert. Dr. Andersen wants me to ask whether it is better for

Coke to decide this or the marketplace.

Mr. Smith. Well, we think that it is better for our bottlers to decide

it, and, indeed, they do.

The forces of the marketplace have a very profound effect on the decision they make, a far more profound effect, I might add, than two men in our former consolidation department.

Mr. Bangert. Earlier in your statement, you mentioned the fact that large numbers of Coca-Cola franchisees favored passage of the

legislation—medium-sized and small-sized franchisees.

I wonder if some of the uncertainty or some of the support may be caused by the uncertainty as to whether or not they would have a franchise if the Federal Trade Commission's case was successful.

I am referring to your letter of June 23, 1972. That, as I understand it, was sent to all of the Coca-Cola franchisees. On page 2 thereof, vou sav:

However, the position taken by the Taft bottler in the lawsuit unavoidably focuses attention on the validity not only of the territorial provisions, but also of

the bottler's contract in its entirety.

There is a long-standing and recognized principle of law that if a material and interrelated provision of a contract is found illegal, the contract as a whole is void and unenforceable.

I am wondering if part of the bottler's dilemma is that if the Federal Trade Commission is successful in this case without congressional action, whether or not Coca-Cola then will be in the position of saying, "You no longer have an effective contract because part of it is stricken, so all of it is stricken," and they would be left without anything.

Mr. Smith. Mr. Bangert, part of the answer to that, I suspect, is legal in nature, and perhaps I should stay away from it. But I welcome the opportunity to speak to that question from a management point

First, I should say that letter was not sent to all of our franchisees. It was not sent to the Taft bottler. It was sent to all other bottlers, carefully scheduled so that it would arrive on this desk, as near as we could schedule it, at the same time that we would be saying that to the Taft bottler in court.

From a business point of view, an example of the situation is this: We have a fixed price, perpetual contract with our bottlers, which is viable because of the exclusive territorial provisions, in our judg-

ment.

If the exclusive territorial provisions cease to exist, it is not conceivable to us that either we or the bottler would be able to continue with that kind of a contract. Now, our absolute, positive commitment is to do everything in our power to protect the continuing relationship that has existed between us and our bottlers for over 70 years.

Mr. Bangert. I have no further questions, Mr. Chairman.

Mr. Chumbris. In the interest of time, Mr. Chairman, I have no further questions.

Senator Hart. Mr. Califano, in view of the exchange, is there any-

thing that you would like to add to the record?

Mr. Califano. No, Mr. Chairman. Thank you. Senator Hart. Gentlemen, thank you very much. Mr. Smith. Thank you very much, Mr. Chairman. Mr. Bangert. Thank you, Mr. Chumbris.

[Exhibits follow. Testimony resumes on p. 194.]

## OCTOBER CONVENTION SPEECH, BY RICHARD D. HARVEY

As Senor Pizzarro suggests, "let's keep it in the family!"

This is as it should be—for a meeting of Coca-Cola people is actually a family reunion. Enjoy yourself . . . not only today, this week, but this Fall . . . for these are the "good old days" you are going to miss in 1989.

As a family, (PAUSE) I ask you to remember that we have excelled when we have moved—cooperatively—in the same direction. Neither of us, neither you nor The Company, has prospered when our courses of action were in conflict.

Yes, cooperation is what I want to talk about with you. First, I wish to make a few observations about cooperation between some of you and other franchise companies. Then, when we have thought about this, let's consider cooperation between you and your neighbors in our family. And last and most important of all, let us discuss cooperation between you and The Company.

Cooperation is a family matter. Our strength is built on this fact, We function like a family, dependent upon each other and yet independent and proud of it! We are able, as a family, to overlook what seems to be (to others) obvious short-comings—minimizing these faults in the spirit of strong friendship and proven understanding.

It's appropriate that our family reunion be held here in Atlanta, our home and the place of origin for our great products. As you know, the world is full of frustrated John Pemberton's —each seeking to find some new combination of ingredients to produce another magic elixir like Coca-Cola. There has never been a product success story like the one you and we have built with Coca-Cola. The key to our success, however, lies not in the combination of ingredients, the skillful blending, the production care, the superior advertising, and the sales and merchandising effort put behind the product. The formula for our success, I believe, comes from our being a family! The Company benefits from strong, aggressive, sophisticated marketers such as you, in all parts of the country, who attack sales and marketing problems with vigor, determination, and even relish and zest! You, in turn, benefit from The Company's skills in interpreting long-term trends, in developing strategies and objectives, and in refining sophisticated marketing techniques. You without The Company, or The Company without you, would each be a shrunken marketing force. This would be true twenty years ago, today, or in the year 2000.

We understand this truth at headquarters. Why else would we encourage our bright, young men to start their careers working with you either as part of Frank Spears' Sales Department or in the Domestic Subsidiaries? Why do we encourage specialists in Advertising & Sales Promotion and the Brand Groups to plan to spend several years of their careers working with you and getting to know your problems and opportunities? Why indeed! We want all of the people responsible for developing our long-range strategies and objectives to know and to understand your problems. We want to strengthen a spirit of cooperation

based on the knowledge gained and shared in working together.

Frank Spears talked with you about the fact that we *live* with *change*. Certainly, the dramatics today have covered this with startling clarity. The task before us is how do *we* change *ourselves* to keep pace with the changes we see all around us while firmly retaining that which has been our *strength* and *foundation?* If we can't change facts, we *can* change our own attitudes.

So, let's start by discussing cooperation with other franchise companies. I would prefer that this subject had not come up. I would be pleased if it did not have to be aired in an open, family meeting. Events, however, have left me little choice. I do want to make it entirely clear that my remarks on this phase of my talk are directed only to a few people in this audience. The implications of the

actions of a few men, though, can affect everything the rest of us do.

A franchise company is *only* as strong as its contract holders. A franchise holder is *only* as strong as the company issuing that contract. The sales volume you have achieved since 1960 in Sprite, TAB, Fresca, Fanta and now Simba, has been built on *top of* the great growth of the product Coca-Cola during these same years, Each of these products has been made available *only* within the family of Coca-Cola USA. Why this? To keep strength in our unity by anticipating your needs and in supplying them. The Company will take no other course

unless by your action you indicate that we should.

As in every great family, there are advantages, privileges, and even idiosyncrasies which are shared and cherished. When some members of the family have divided loyalties, however, electing to choose alternative courses of action, the remaining members have no choice but to do whatever is necessary to keep the family strong and healthy. There is turmoil in the marketplace affecting our traditional relationships. I don't recall a time in our business when the Latin phrase "Caveat emptor"—let the buyer beware—is more appropriate. The tensions in the marketplace result in some strange alliances. Let me be specific:— Dr. Pepper is aligning itself with either Coke or Pepsi franchise holders as the local situation indicates. This results in a cross-network among otherwise natural competitors—and often in geographically contiguous marketing areas. To illustrate, the Coca-Cola plants in Philadelphia and Atlantic City have recently added Dr. Pepper. In neighboring Baltimore, Pepsi has begun distribution of Dr. Pepper. After their expensive, destructive and abortive attempts to build new business with Wink and Sport Cola, it appears that Canada Dry is liquidating their less profitable Company-owned plants and trying in other areas to find stronger marketers. Both of these are happening at your expense.

When you are tempted to broaden your line beyond the products offered you by The Company, ask yourself if you really are buying or if you're being bought. You have priceless assets in the soft drink business. These include your name, your organizational ability, your access to financing, and a cold drink market that is the envy of all. Others are tempting some of you to pick up and add to your line franchise products which are not a member of our family. Remember. that you and we proved with Fresca that the quickest and best way to build new sales and profits is with a new brand name and the best advertising in the industry. In spite of any problems with Fresca, its share of the market outside the Southwest (as measured by Nielsen) is greater than that of Dr. Pepper.

Fortunately, for all of us, this kind of alignment between some of your family members and other franchise companies is limited. It will remain small if you and we work together to analyze and evaluate clearly any proposals made to sway your loyalty and weaken your relationship with us. When it would be premature, we cannot reveal our long-range plans for new products and other developments. This information, however, is available to you confidentially whenever you are about to be influenced by an offer from an outsider to ally with your

natural competitors.

Now, let me state this clearly: if one of your associates elects to drop one of our mutual products for a competitive one, then he cannot object if The Company exercises the same right and elects to regain that lost distribution through another channel. If one of your associates elects to add another franchise line, thus diverting his investment dollars from those in which we all benefit, he cannot object if The Company diverts its investment dollars to activities which favor only The Company.

So much for cooperation with other franchise companies. As I said earlier, I regret that circumstances require that these comments be made. We understand clearly and definitely the position of each person in our business

partnership.

Now let's talk about the second area of cooperation. Cooperation between you

and your neighbors in our family.

Each of you must decide for himself how you will cooperate within the framework of the present as it evolves into the future. The basic decision on cooperation always has and continues to be the individual decision of each individual

person. There are several avenues available.

The first and simplest decision to cooperate comes in the marketing district in which you are located. To be an effective marketing entity, we must present a unified front to all of our consumers. This means we must package alike, advertise alike, offer promotions and pricing uniformly attractive in the marketplace. This is the first example of cooperation. It is being practiced in marketing districts all across the country. This example of cooperation is not, unfortunately. universal. There are more examples of the exception than the rule. If we are to survive, however, we must find a way to reach better agreement with each other on what and when to promote, what and when to advertise, what and when to sell.

The logical extension of marketing district cooperation is two-fold. First, there is an opportunity where this is legally possible to utilize the marketing district organization to increase the effectiveness of your purchasing power. The next step that is available to everyone of you is to look beyond the confines of the present marketing district and consider growth patterns and plans on a regional basis. We have done considerable work in this area trying to determine where and how the United States can best be served by 1975 and by 1980. Your District Manager, your Regional Manager, your Area Manager, each has information on the work that we have done both in suggested mergers of marketing districts and in the location of new giant production centers. We will be happy to work with you, as you desire, in sharing this information to leap-frog our present marketing district activity to regional activity.

The great production centers Frank Spears talked about suggest a second form of cooperation. All of the experts tell us that the real economies from consolidation will come from consolidating production locations rather than distribution locations. These economies will accrue only to a few, however, unless there is greater cooperation among all who can be served by a single production center. In some instances you will want to re-structure your business entity, taking all or many of the plants currently operating separately and merging them into a new corporation. Isn't it better for you to retain for yourself a smaller portion of a growing business operation rather than all of an outmoded inefficient shrinking business? You know it's better to have a piece of the action in a business that is expanding and making money!

Another opportunity in this same area of cooperation suggests that you and your neighbors might organize a venture which would, in fact, handle all or part of the production needs of your present entities.

Finally, there's the option of selling to your larger neighbor and, thus, being in a position to re-invest your equity in other enterprises in your community, or

increasing your equity by buying a smaller neighbor.

When we first became active in mergers and consolidations, we considered the minimum profitable production operation to be 100M cases. In a very short time, we found it necessary to raise this minimum to 500M cases. Today, we consider a minimum profitable production operation to be 1 million cases. Undoubtedly, in the future, new technology will escalate this minimum number even higher. For example, the Glass Container Manufacturers Institute is working with us to test a new filler which at only \$5% of capacity will produce 8 million cases of 10-ounce one-way bottles a year.

Obviously, this is what outside companies see as they step up their investments in the soft drink business. General Cineman, Westinghouse, General Tire and others all form a new kind of competition for us—that of huge operations with maxs purchasing power, seemingly unlimited capital, and professional management. Yet in looking closely at these operations, we see revealed great strength that exists in our family which, properly used and motivated, will permit us to retain our leadership. For example, these large corporations do not have the management flexibility to compete against the number of widely-motivated decision-makers you have proved to be. Those of you who do compete against these large competitors tell us you can predict with almost unerring accuracy how the manager will respond in a competitive situation once you have an understanding of the profit practices and demands in which he operates. Yes, there are advantages in being a member of a large organization. There are equal compensating advantages in being an active member of a small organization, cooperating with other small companies in a close-knit family relationship.

The choice is yours and yours alone. You must determine how—not whether, but how—you will cooperate today, next year, and in the years ahead. Regardless of your choice—regardless of when you make this choice—what you do between now and then will determine the ralue of your business. While you are making your choice, the needs of your territory go on. While you are making your choice, your dealers need coolers and racks—yours or somebody else's. While you are making your choice, your outlets need signs—yours or somebody else's. While you are making your choice, your customers need variety in packaging and products—yours or somebody else's. Regardless of how you choose to cooperate, you must continue to build your business. You must make it stronger and financially more attractive by continuing your investment in coolers, racks, signs, trucks, manpower and all the other elements of the marketing-mix that

have brought your business to the profitable level it enjoys today.

Many of you tell us that more than half of your investment now is in marketing assets, not production assets. More than half of your dollars are spent for coolers, signs, trucks, racks and the other tools necessary to increase the sale of our products. The challenge before us is to push more goods, utilizing more profitably this investment. Thus, you increase the return on your investment for profits today and, in addition, increase value of your business in the future. The secret to increasing return on investment is improving the efficiency of the investment—its competent use. Therefore, we face a new challenge. As you have learned to put your wholesale prices in tune with the changes in our economy, you must now learn to become less dependent on price adjustment as a profit generator. You must become more acute in your ability to increase the return on the investment you already have in our business partnership.

So much for cooperation among you and your family members. Now let's talk

about cooperation with The Company.

Several years ago we began to offer cooperative advertising programs by marketing district rather than by each individual operation. We shall continue this.

We design National Sales Promotion activities around individual marketing districts. A national promotion is really only one that is being staged in all or most marketing districts at the same time. The key to the success of any promotion is not how many used it, but how well it was used in a marketing district to encourage you to work and develop your business with our aid. In the past few years we have suggested fewer national promotions. This will continue.

In the past few years we have offered more local promotions, or promotions to

be scheduled only within a marketing district. This will continue.

We believe in marketing district cooperation and will continue to put our dollars and manpower behind this kind of cooperation. Kindly remember that dollars alone are not enough. Dollars can be effective only when you elect to use them and to parlay them into greater sales and profits . . . for our mutual benefit.

An additional form of cooperation between you and The Company is available

around the massive production centers, I mentioned earlier.

We feel it is more important that all the consumers in a marketing district have access to a particular product or particular package size than it is to be sure that this product or package size is produced locally in many separate locations. In this regard. The Company has already recognized this need by relaxing the contractual requirement for local production on certain bottle sizes such as twist-top quart one-way bottles for Coke or for some of the Allied Products. particularly in no-deposit, no-return packages. This same step has been taken some time ago for the canning operations. Let me assure you we will continue to do this.

I mentioned before that the major economies in the future seem to lie in the production operation. The Company is anxious for you to have every opportunity to participate in these economies. The Company will carefully consider any request which is designed to help you market more efficiently and share in these production economies. I mentioned earlier that we consider a million cases as a minimum production center size. I say again that this figure will undoubtedly grow rapidly with the advent of new technology now on our horizon. Where you can work with your neighbors in the family to establish a mutually satisfactory production arrangement to bring your operation up to this level, we offer our help and our encouragement. You can count on this!

Let me make one point crystal clear. We are concerned about facing the pressures of the future with the strongest, most united, and most aggressive family possible. You are this family. You are our partners in your community. We will take any step necessary to advance and protect this valued relationship

with you.

We live in a world of change. The forces of change are exciting, stimulating, exhilarating. Your Company is changing to serve you better in the future days that lie ahead as you can see in our exhibits—and as you will hear from Ike Herbert and Al Pickhardt tomorrow. We urge you to change with us. Then together we will continue our leadership in the soft drink industry . . . and leadership equates as the most sales of the best products. It comes down to that. I've talked about three forms of cooperation. Which is yours to be? As the old man said, "There are three ways from here to the cotton gin. But when you get there, the ginner ain't going to ask which way you took. He's going to ask, "How good is your cotton?"

In moving into the future, ask yourself: how good will your cooperation be?

SEPTEMBER S, 1970.

To: Mr. Richard D. Harvey, Marketing Division, Atlanta. From: George C. Trippe, Bottler Consolidations, Atlanta. Subject: Monthly report, August.

Waddy Anderson, our Bottler in Greenville, South Carolina, has advised that exploration of a joint venture production center in the Greenville area has been abandoned because the owners of Asheville and Spartanburg have advised their management they do not approve.

A majority of the time of this Department's personnel was devoted to a continued effort to bring the Mashburn Project to a successful conclusion this

month. The Project remained unresolved at the end of the month.

Consultation with and continued follow up through Area Manager Blanchard, has brought the question of a bottler joint venture acquisition of the Nashua Canning facility nearer a resolution.

In response to our meeting with John Haves, Spokane Bottler, last month he advised he wanted to sell to DBS. He has been advised in writing that Coca-Cola USA is not interested in buying but the Area office would assist in any way it, or we, can in locating a satisfactory purchaser.

Initial work started with Thomas Liaison of BSD to engage Sam Peters to make a financial study of Dayton, Ohio. Indications are this Bottler is in serious

financial trouble.

Work was continued with Area Manager Burrous to resolve the problems of selling St. Louis and Detroit. Satisfactory solutions not yet forthcoming, although progress in getting Stroh's Brewing Company into active negotiations with Detroit is encouraging.

We have not yet heard from Cecil Smith or Robert Dunn with reference to our proposal to assist them to exchange ownership of Columbus, Georgia for another area where there would be no conflict of interest. We consider this

possibility still alive.

Distributor for Stroh's Beer reportedly has made firm offer to Alpena Bottler of \$325,000. 7-Up Bottler has "cooled off" and DBS cannot justify total package. Area manager Burrous is investigating through his contacts at Stroh's in Detroit.

June 2, 1971.

To: Mr. Richard D. Harvey. From: George C. Trippe. Subject: Monthly Report, May.

The Mashburn Project is still unresolved. There is still an outside chance that Frank Late may move quickly enough to buy the Mashburn interests, but the possibility is not too good. The distressing fact is that John Bullock has lost control of the situation, and the family appears to be moving in several directions. It is reported that Wometco has expressed interest and a figure between \$17 and \$19 million has been mentioned. (This paragraph is for R. D. Harvey only.)

We met with Mr. Dan Byrd and Mr. John Duffy of Springs Mills, Inc. to discuss with them the plans of that company for diversification. We learned they hope to invest approximately \$50 million within the next eighteen months, and if their diversification activities were successful, this figure might be increased to \$100 million. Mr. Duffy indicated they would not want to become involved in ownership of our bottling plants unless they were able to start with an investment in the neighborhood of \$10 million or more. These gentlemen were advised that opportunities for an investment of that magnitude occurred very rarely. However, they were told their interest was appreciated, and we would contact them if anything developed which appeared mutually desirable.

Subsequent analysis has indicated that Springs Mills, Inc. has substantial cash available, and a debt capacity considerably greater than they have used. However, in 1970 the company paid out more in dividends than it earned, and its stock is selling at a very low price/earnings ratio. Springs Mills, Inc. has as an objective an immediate improvement in profits, and it is possible that this corporate objective of theirs is not compatible with our objective of obtaining new ownership of bottling plants that are in need of rebuilding. We do not consider them

a very strong prospective plant purchaser.

As requested, several days were spent obtaining background information and preparing a Contingency Plan which the Company might put in operation in the

event one or more of its bottlers should become insolvent.

We have learned that following our meeting with Knox Bell of Monroe, Georgia, and Bob Davidson of the Trust Company, the Bell Family purchased the Rainwater 50% interest in Monroe, Georgia. This was disappointing since we had done everything we could to encourage Knox Bell to sell to Rainwater rather than buy.

We met with Jim Wimberly and Mr. Russell Goodwin to discuss with Mr. Goodwin the future of Russellville, Alabama. Mr. Goodwin had been retained by the owner of Russellville to assist her in future planning. We believe he agreed with us that it would be in the best interests of the present owner to consider selling the sub-bottling company at Russellville to Birmingham, its First Line Bottler.

MARCH 3, 1971.

To: Mr. Richard D. Harvey. From: George C. Trippe.

Subject: Monthly Report, February.

During the month efforts were continued to keep Pet interested in the Mashburns and to get them to make a decision. Early in the month Frank Late was brought into the Mashburn situation and he is involved in active discussions with the Mashburns's spokesman. (This first paragraph is for Richard D. Harvey's information only, and not to be included in the Division Summary.)

Pittsburgh was visited with Larry Cowart to discuss financial planning with

that Bottler.

Planning Seminars for mergers and consolidations were held with personnel of the Dixie and Midsouth Regions. The Regional Managers and their District Managers actively participated in establishing their own objectives and priorities for accomplishing those objectives on a plant-by-plant basis. Those in attendance stated they felt the day was most helpful to them.

A day was spent with Sam Peters discussing Dayton, Arrangements were made with Peters to proceed with a valuation of the business for future reference. Currently he is working with Dayton ownership and management to bring about

an improvement in the financial position of this Bottler.

W. C. Dawson, Jr. of Elizabeth City, North Carolina, called on us to discuss his plans to build a new plant. Since Elizabeth City is a sub of Norfolk, Virginia, Mr. Dawson was advised to meet with the Norfolk Bottler and also the Thomas Company prior to proceeding with any building plans. He was encouraged to explore every alternative to making such an investment at this time.

At the request of George Lawson, we met with him, Dick Atwood, and Ed Wolfe and Mario Liaz-Cruz of the New York law firm that will represent the Company in connection with the FTC proposed complaint. A thorough discussion of the history and functions of the department was had with these gentlemen.

During the month the Contractual Department finalized the following consolidations: Union City merged into Portland, Ind., and made a branch of Portland; Houston, Miss. merged into Aberdeen, Miss.; Miami, Okla., merged into Vinita, Okla.; Werton, Kansas, merged into Colorado Springs, Colo.; Falls City and Fremont, Nebr., merged into Lincoln, Nebr.; Key West, Fla., eliminated as a branch plant of Miami.

MAY 3. 1971.

To: Mr. Richard D. Harvey. From: George C. Trippe. Subject: Monthly report, April.

We attended and participated in the meeting with Bill Williams and Jim Hayes requested by them. They wanted to review the progress of Akron Coca-Cola Bottling Company over the past five years, and discuss their plans for further expansion during the next five years. They advised us of their desire to acquire the Sandusky warehouse territory to strengthen their recently acquired Elyria operation. They were informed that Sandusky belongs in another marketing area, and given no encouragement other than to tell them that our top management would be advised of their interest.

We met with Knox Bell of Monroe, Georgia, and Bob Davidson of the Trust Company, to discuss with them the advisability of the Bell Family purchasing the Rainwater 50% interest in the Monroe plant, or whether it would be in their best interest to sell to Rainwater. We encouraged Knox Bell to consider

selling, but it is doubtful that he will elect this option,

At the request of Tom Bogart, we met with him and Phillip H. G. Lopatnikov of Lopatnikov Associates. John Bitzer of Pittsburgh has employed Mr. Lopatnikov to assist him with his long range financial planning, and specifically with future plans for acquisitions by Pittsburgh.

Planning Seminars for mergers and consolidations were held with the Eastern Area personnel, and with the Eastern and Western Regional personnel of the Southwestern Area. Interest in participation by B.S.D. personnel in these Plan-

ning Seminars was excellent.

It was reported by Don Wilson that Payette, Idaho, has been purchased by a local beer distributor. He hopes also to acquire Boise and will be encouraged to do so by Don Wilson, This, of course, prevents John Hayes of Spokane from

pursuing acquisition of these plants further.

At the request of Don Wilson, Joe Snelus was consulted to determine the data needed by DBS if Spokane should sell its building to provide funds for acquiring Wenatchee. Don Wilson was advised of the results. It is doubtful that DBS will give its approval as the building is the major asset Spokane owns, and the major portion of the purchase price of this operation remains unpaid.

Acquisition of Hood River by Pacific Coca-Cola Bottling Company has been approved by the Finance Committee, and a contract to buy it has been forwarded

to Bob Windmiller for execution by the parties.

C. S. Lord has been given approval to make a preliminary analysis of the value of Muskegon, Michigan, to determine if this will be a profitable acquisition for the Michigan Company, Mr. Lord is investigating to see whether DBS personnel will have the time to make this analysis, or if it will be necessary to

employ a consultant such as Ollie Aspegren or Sam Peters. We have offered Mr. Lord any assistance we can give, and will actively follow up with him to get this study completed as soon as possible.

Frank Late has purchased the stock of Liberal, Kansas, and this plant will be made a warehouse with Wichita supplying product as soon as the papers can

be prepared and executed.

Bay City, Michigan, ceased production on April 16 and will be a warehouse with product supplied from Flint. The elimination of this branch of the Michigan

Company has not yet been completed by the Contractual Department.

During April Muncie, Indiana, was reinstated as a sub of Indianapolis; Rock Island, Illinois, was acquired by Cedar Rapids, Iowa, and will be made a warehouse; Gainesville, Texas, was acquired by Dallas and is now a warehouse; West Blocton, Alabama, a sub of Birmingham, has been acquired by Birmingham and eliminated in its entirety; Homestead, Florida, branch of Miami, has been closed as a producing plant and is now a warehouse; Morgantown, West Virginia, was acquired by Clarksburg, West Virginia, and merged with Clarksburg; Punta Gorda, Florida, a sub of Tampa, has been acquired by Florida Coca-Cola Bottling Company and is now operated as a warehouse with product supplied by Sarasota.

Sedalia, Missouri, has been made a Marketing Bottler with all products proc-

essed by Kansas City, Missouri.

Total number of operating Bottlers was reduced from 825 to 820 during the month.

OCTOBER 8, 1970.

## To: Mr. R. D. Harvey.

Attended the Coca-Cola Bottlers' Association meeting and presented the Company's program for mergers and consolidations to the State Council Chairmen.

Met briefly with Conrad Dunagan of Monahans, Texas, to discuss the long range plans for the El Paso production center and natural marketing area. Mr. Dunagan was urged to follow through by consulting Area Manager J. D. Britton and his staff before investing in a new warehouse he has under consideration.

Continued to counsel and work with Area Manager Blanchard on the proposed Nashua joint venture. Attended the final meeting when the committee, appointed by the group, reported to the total group that their study indicated the acquisition of Nashua by the proposed joint venture would not strengthen their position in regard to their contracts, nor would it substantially lower the cost of cans. The committee recommended that the total group express appreciation to Coca-Cola USA for its willingness to explore this possibility, and also to compliment Canners for CocaCola Bottlers, Inc. on the service they have been rendering. The matter of the purchase of Nashua by the New England bottlers can now be considered closed. The bottlers have again been interested in exploring interim plans, such as cross bottling, until such time as the production centers can become a

After months of skillfully guiding prospective buyers of Detroit. Area Vice President Homer Burrous and his staff successfully brought the owners of Detroit and Stroh's Brewery together. As announced at the Marketing Division Meeting. the acquisition of Detroit Coca-Cola Bottling Company by Stroh's is in its final stages. The next steps to be taken will be to offer Stroh's all assistance possible to acquire the subs of Detroit, and then to open negotiations with them on their

possible acquisition of the Michigan Company.

General Area was advised that DBS could not pursue the purchase of Alpena and Muskegon at this time. The Area Manager has now recommended that we approve sale of Alpena to Dehring Distributing Company of Alpena, the Stroh's distributor for this area. Dehring was formerly an RC bottler, is currently distributing RC in cans, but has agreed to discontinue this distribution if he is successful in purchasing the Alpena plant.

Area personnel were advised to discuss with Mrs. Peterson, owner of Muskegon, and Dale Alexander (General Manager of the Michigan Company) the possibility of Muskegon becoming a marketing bottler with the Michigan Company its agent for bottling.

Morton S. Hodgson and Joe Snelus were asked to encourage Robert Windmiller to bring to a conclusion negotiations to acquire Hood River, Oregon. The acquisitions of Hood River and Tiffin, Ohio, are still pending.

A day was spent with Bill Terry in Lexington to learn all we could about how he has financed his acquisitions in the past. Discussions with Bill Terry indicated that changes in the tax laws and the present tight money situation would preclude using same of his past methods successfully.

## BOTTLER CONSOLIDATIONS DEPARTMENT-OUTLINE

PRESENTATION TO PRESIDENT'S ADVISORY COUNCIL, FEBRUARY 27, 1970

(Mr. Dickson will introduce us and lead to George Trippe.)

## I. POLICY CHANGE

A. Quote from Dick Harvey's Convention speech:

"I mentioned before that the major economies in the future seem to lie in the production operation. The Company is anxious for you to have every opportunity to participate in these economies. The Company will carefully consider any request which is designed to help you market more efficiently and share in these production economies. Where you can work with your neighbors in the family to establish a mutually satisfactory production arrangement, we offer our help and encouragement."

B. Admit "that's quite a mouthful" because it's a departure from our tradi-

tional view as follows:

1. We had always required bottling in territory;

2. A small Bottler has only two basic options: (a) Go downhill, (b) Sell/merge.

4. Our posture had been basically reactive in nature.

## II. HOW DID WE ARRIVE AT DECISION TO CHANGE TIME-HONORED POLICY?

A. Long Range Planning Study—highlighted

- 1. Needed to take advantage of economies of scale in production—economies of scale for distribution not that great or worthwhile to pursue. (Mention: Must distinguish between economies and efficiencies. Economies of scale relate to savings because of larger size operations; efficiencies relate to better utilization of current operations. Thus, the lack of economies of scale for the distribution end of the business does not preclude the existence of efficiencies.)
  - 2. Value of local marketer

3. Hierarchy of function:

Production

Marketing Area

Cooler Service; P-O-S

Transportation

Distribution points

(It's not necessary for same ownership vertically as has been in the past.)

B. Technological Change: GCP, GCMI, Plastic; how many Bottlers as presently constituted could take advantage of this. (Mention: Plastic might be self-manufactured, as cans are, in the production center.) (Mention: Typical capacities.)

C. Legal Climate: Recent court decisions—the best known being the Schwinn

Case—have weakened contract to some unknown degree.

Since radical change was not necessary on distribution side of equation, leave

it as is to the extent possible, and make adjustments on production side-

Thus—these three developments led to the conclusion to: (1) Leave contract intact; (2) Make available Marketing Bottler option. (Mention: Source of production either a large Bottler or joint production venture.). (3) Still encourage mergers and acquisitions depending on the situation and among very small Bottlers. (4) Coca-Cola USA take a more active role in leading Bottlers.

#### III. WHY DID WE ARRIVE AT THIS DECISION?

A. Survival—Our system against someone else's—a new entry, or traditional competition—who moves faster; if we don't stay most efficient, we lose.

B. Other reasons—(1) Less cash investment for both large Bottlers and small Bottlers. (2) Maintain local identity. (3) Nothing much to be saved by cutting out distribution points, except for the very smallest (under 4-5 routes).

## IV. WHERE DO WE STAND NOW ?- (READ THROUGH LIST FIRST)

A. We have specific responsibility within the organization, reporting to the Marketing Director.

B. We have a map indicating long-range production center configuration.

C. We have a framework for evaluating the practicality of a Marketing Bottler-Processing Bottler arrangement. ("Contractual Approval Grounds"—but don't call them that.)

D. We have some specific ideas of what a good processing agreement should include.

E. We are equipping the field force with the basic knowledge necessary for them to play a catalyst role.

Now, let's look at each in turn.

#### IV. A. BOTTLER CONSOLIDATIONS DEPARTMENT

1a. Formed after Convention to follow up and develop plans to implement policy changes announced at Convention.

1b. Forerunner of Bottler Consolidations Department—(Assistant to General Manager of Bottler Sales Department).

2. Charter of Bottler Consolidations Department.

3. Principal functions (re-word from job description format so it is a little

more straightforward than job description language).

(At this time, I want to call on George Overend to discuss the 1980 Map.) B. 1980 Map: (1) Derivation: (a) Computer map-2 models: (1) how many, (2) where located; (b) Marketing area map: 94, (c) Melding of the two-practical judgment, highways, etc. (d) Final configuration: 75 and 85 (show

2. Rules for interpretation: (a) Map is flexible, (b) Certain plants are swing plants, (c) Built on module concept, (d) Change in conditions may lead to an adjustment, (e) Haven't decided on center location. Local analysis necessary. (f) May have several maps ultimately . . . one for each functional hierarchy.

3. Purposes: (a) If want to sell, who you should sell to, (b) If want to form

production center, who you should get together with.

C. Consideration of Marketing Bottler—Processing Bottler Arrangement. (Read Slide.) (Mention: Possibly 2 different ownership structures for production center and approval not automatic.) (Refer to document and elaborate.)
D. Guidelines for Processing Agreement. (Read Slide.) (Refer to document

and elaborate.)

E. Field Force Training: (1) Area Staffs; (2) Merger Seminars-District Managers and Quality Supervisors act as catalysts, not experts.

## V. THE PLANNING PROCESS

A. Interim planning very important—the adjustment process between now and the "1980" solution is tricky and difficult. (Examples—work together for

B. Red flags—solid waste disposal.
C. Big help in planning is the map—it shows who should be planning together. (Call for questions and discussion at this point.)

## VI. HOW SHOULD WE COMMUNICATE WITH BOTTLERS?

Discussion should cover options for communicating above information to Bottlers: (1) On a purposeful basis—cover everyone? (2) On a request basis? (3) Long-range planning graphs and slides? (Show some) (4) Harvard cases? (5) Other ideas? (Now, George Overend to discuss. . . .)

## VII. PUBLIC OWNERSHIP-PRO & CON

Explain that this issue is certainly involved with the over-all job we're trying

to do; that's why we are discussing it here.

List pros & cons: Pros: Source of capital; Company transformed from a person to an organization; Establishes a value for personal holdings and provides liquidity; Serves to attract professional management to the firm; Base for subsequent capital.

Cons: There are easier ways to raise capital. Takes time and money; Disclosure of personal information is a shock; Mercy of the public; (a) Lack of flexibility in tax avoidance, (b) Pressure for increased profits—year by year (also impairs flexibility), (c) General lack of flexibility in making financial policy decisions.

Raise "red flag" that going public shouldn't be a fad, nor should it be looked on as a panacea.

Discussion on this topic.

## Coca-Cola—December 29, 1969

## CONFIDENTIAL-FOR INTERNAL USE ONLY

To. Mr. George C. Trippe, Atlanta, Ga. From: George D. Overend, Atlanta, Ga.

CONTRACTUAL APPROVAL GROUNDS—REQUEST TO BECOME A MARKETING BOTTLER (FORM A)

The over-all criterion to be satisfied in approving a request to become a marketing bottler is: will this contractual arrangement serve to achieve or protect the optimum marketing network for Coca-Cola USA and the party or parties involved? The possibilities for improvement over the current situation (depending upon the facts in the current situation) must be evaluated.

Deciding whether this over-all criterion is met will include evaluation of the

specific facts in four ways.

First, does the proposed network between processing bottler and marketing bottler satisfy our best current judgment as to the proper long-run (1980) production center configuration and natural marketing area configuration?

Second, have the two parties (i.e. processing bottler and marketing bottler) negotiate an appropriate and acceptable processing agreement that will best insure availability of products to allow the geographic territory defined in the marketing bottler's contract to be served adequately and properly? (A separate memo outlines specific items that should be covered by this processing agreement.)

Third, is the financial position of the two parties strong enough to allow the continued growth of sales of Coca-Cola in the marketing bottler's territory? Consideration of financial strength of both parties would include determining if the parties would be large enough in size to be viable processing and marketing entities.

Fourth, based on past performance and current attitude, is there a reasonable expectation that the marketing bottler(s) will and can satisfy the contractual

obligation of vigorously promoting the sale of Coca-Cola?

I recommend that each specific proposal be looked at in total, so that we can apply trade-off judgment between categories. For example, if a bottler appears to be too small to be a viable marketing bottler, but he has a high per capita and has exercised leadership among the other bottlers, then his outstanding marketing strength might offset his small size and his request to be a marketing bottler would be approved.

For those proposals which are not approved, I suggest that the explanation be as brief as possible unless there are opportunities for removing the grounds for the decision. We should avoid having to defend unduly our decisions in this area. Obviously, thet feedback should be from the Area Manager, since he was

the point of origin of the request.

#### POSITION DESCRIPTION

Position: Manager—Bottler Consolidations Department. Reports to: Vice President—Director of Marketing. Basic responsibility: To move Coca-Cola USA, and structure of its Bottler distribution system, in line with the Company's long range objective to permit all parties to take advantage of current and future economies of scale in both production and marketing areas of the distribution system; the end result to be a system with the strongest marketing and financial partners capable of competing with present or future competitors on a favorable, technical, marketing and cost basis.

Supervision of personnel: Direct supervision of 1 (or more) Project Manager(s),

and 1 Senior Secretary.

Standards of performance: Standards of performance are met when present Bottler distribution system is strengthened to permit all parties to benefit from current and future economies of scale, in both production and marketing areas, of the system in keeping with the Company's long range planning and objectives.

## PRINCIPAL DUTIES

(1) Be responsible for final marketing approval, and to obtain legal clearance, of any proposed Bottler combinations including mergers of two or more Bottlers; acquisitions of bottling companies by other Bottlers of Coca-Cola or third parties;

transfer of part(s) of territory from one Bottler to another; and joint ventures created by Bottlers to establish centralized production centers.

(2) Initiate new programs and policies to accelerate mergers and consolidations of Bottler territories within natural marketing areas, and discourage acquisitions outside a Bottler's area except central markets in the second area.

(3) Provide final marketing approval to Contractual Department for all Temporary Bottling Agreements, and marketing of new products and new pack-

ages by all Bottlers as recommended by Area Managers.

(4) Work with Bottler Sales Department Staff and each Area Manager to establish and communicate both long-term and short-range objectives for mergers and consolidations.

(5) Counsel Area Managers and their Field sales personnel on general elements

of Bottler combinations and specific situations as they develop.

(6) Work with Training Session to develop and implement a Field Training Seminar on mergers and consolidations, and to develop Strategy '70 Seminars, based on the Planning Office's NEP, to be available as a Field tool for use with

pre-conditioned and interested groups of Bottlers.

(7) Meet and counsel with owners and managers of bottling companies with appropriate Bottler Sales Field personnel and, when desirable, Officers of Coca-Cola USA on specific consolidation proposals. Assign such proposals to Project Manager(s) for analysis and recommendations as needed and appropriate.

(8) Develop with assistance of Bottler Sales Field management and Project Manager(s) programs of financial assistance in those instances where Coca-Cola USA wants to encourage friendly ownership. Implement recommendations

for use of the withholding policy where the reverse is true.

(9) Maintain a current list of possible buyers and recommend those most

desirable when potential plant sales develop.

(10) As representative of the Vice President and Director of Marketing, coordinate personnel resources internally and externally to make certain that Sales, Production, Technical and Marketing people operating in the area of mergers and consolidations are all coordinated as well as outside consultants we recommend and rely on. Use Project Manager(s), as appropriate, to maintain liaison with these groups as well as Legal and Contractual Departments.

(11) Handle all correspondence and inquiries in regard to availability of Bottlers holding our contracts being for sale. Meet with prospective buyers

when appropriate.

## PROJECT MANAGER, BOTTLER CONSOLIDATIONS DEPARTMENT

Position reports to: Manager, Bottler Consolidations Department. Basic responsibility: Provides assistance in the planning, analysis, and development of the basic objectives of the Bottler Consolidations Department for specific projects as assigned. Supervision of personnel: May have supervision, or partial supervision, over a secretary. Standards of performance: Standards of Performance are met when assigned projects are completed in a satisfactory manner on or ahead of schedule.

## PRINCIPAL DUTIES

(1) Assumes active leadership and responsibility for Bottler Consolidations projects specifically assigned by the department Manager.

(2) Assists in the development of programs and approaches which satisfy the key elements of the Bottler Consolidations Department objectives.

(3) Maintains close supervision over all aspects of assigned projects.

(4) Performs other duties as assigned.

Coca-Cola-February 3, 1969.

To: Mr. Francis H. Spears, Bottler Sales—Adm., Atlanta, Ga. From: George C. Trippe, Bottler Sales—Adm., Atlanta, Ga.

Attended meeting in Mr. T. C. Law's office for discussion of 1969 Convention plans.

Met with J. C. Bell and discussed the Company's policy position in regard to mergers and also in regard to Company-owned canning facilities to assist J. C. in writing preliminary scripts on these subjects for the 1969 Convention.

Met with Werner Cederberg, Mr. Kenneth Youngs, and Mr. James Youngs to discuss the possibility of the Youngs acquiring one of our bottling plants. While in the Central Office, had an opportunity to meet Leonard Green, owner of Rock

Island, Illinois, and Ventura, California. Also during this call, discussed with Homer Key the need to revise format and/or content of the Monthly Progress

Reports.

Met with Mr. Charles Childs, Jr. and Mr. Robert Musselman of Equity National Financial Corporation. This company is interested in diversifying and exploring the possibility of buying a plant with a contract to bottle and sell Coca-Cola.

Attended meeting held by Harry Teasley and Bob Broadwater on the present

status of the 16-oz. contour one-way bottle.

Met with Mr. Peter Stewart of Stewart Company, Charlie Battle, and Bud Randolph. This meeting was for the purpose of our becoming acquainted with Mr. Stewart and he with us in order that we might explore the possibility of Stewart

Company acquiring one or more of our bottling plants.

Met in Boston with John Tiernan of Presque Isle and Jim Evans to discuss various alternatives available to John Tiernan since his plant was destroyed by fire. John Tiernan presently plans to resume production and at the same time to explore with Turner Jones alternatives of merging Presque Isle with the Maine, Inc. plants, or possibly acquiring Bangor from Maine, Inc. and merging that

operation with Presque Isle.

Berrien Sutton of Associated Coca-Cola Bottling Plants, Inc. telephoned to advise that they were ready to at least have an exploratory talk with one prospective purchaser for St. Louis, Berrien made it clear this was not a commitment to sell, but merely a willingness to have preliminary exploratory talks with one purchaser we might recommend. This opportuniaty has been made known to Aaron Goldman. President of The Macke Company. Mr. Goldman has promised to advise us no later than February 7 whether he would pursue the possible acquisition of St. Louis or not.

Mr. T. C. Law and I met with a group of new employees in Phil Garswell's office. This was an orientation session to acquaint these people with the background and

functions of Bottler Sales and Fountain Sales.

COCA-COLA-September 2, 1969.

To: Mr. Francis H. Spears, Atlanta, Ga. From: George C. Trippe, Atlanta, Ga.

Continued work on revision of Multiple Plant Ownership Book.

Had several meetings with George Overend and David Thirsk to reconcile differences in the Production Centers proposal of the Planning Office and our Marketing Districts. Overend and Thirsk are now preparing a revised map with Marketing Districts coinciding with Production Center areas, 179 plants were moved from one Production Center to another, and 70 plants were moved from present Marketing Districts.

Corrections are being made in the recently revised list of Short Range Proposed Mergers by Areas to reflect the changes resulting from reconciling Produc-

tion and Marketing District maps.

Met with Walter Susong, Jim Wimberly, Willie Barron and Alfred Lee Barron with reference to their proposed acquisition of Dr. Pepper. Subsequently served on committee appointed by Dick Harvey and chaired by Bruce Gilbert to study the question of our Bottlers acquiring franchises of other nationally advertised products, and to recommend steps the Company might take to reverse this trend.

At the request of Fred Dickson, met with L. T. Christian and discussed his participation in the proposed Eastern Pennsylvania canning facility to be owned and operated by the Bottlers in that area. A conclusion of this discussion L. T. Christian expressed some doubt about his participating in this venture but did

not make a definite decision.

Called on Mr. Hoffberger of National Brewery in Baltimore with Fred Dickson. Mr. Hoffberger bad expressed interest to Mr. Austin in buying one or more of our larger bottling plants. Subsequent to this meeting, Mr. Dickson privately expressed to me some question as to whether we should encourage Mr. Hoffberger or not. Mr. Hoffberger was advised we know of only three plants, where we would like to see a change of ownership, that were of sufficient size to be of interest to him; namely, Detroit, Cleveland, and St. Louis. He was told the owners of Cleveland and Detroit had not expressed interest in selling to date, and St. Louis was currently in negotiations with another party. Mr. Dickson told Mr. Hoffberger we would get back in touch with him should the present negotiations for St. Louis fall through.

Met with Mr. Homer Burrous to discuss the problem he is encountering with Des Moines. Iowa, and Danvile, Illinois. Des Moines is in extremely bad financial shape, and Danville is rumored to be selling at a figure we consider too high. Homer and I also discussed these situations with Walter Susong. Homer is to keep us advised.

Prepared and distributed Monthly Report for July.

COCA-COLA-JUNE 6, 1969

To: Mr. F. H. Spears, From: George C. Trippe

Attended and participated in the following meetings:

(1) Meeting in advance of the May 2nd meeting with the Marketing Committee of the Coca-Cola Bottlers' Association.

(2) Meeting with Owens-Illinois representatives on what that company is doing to assist in resolving glass supply problems.

(3) May Staff meeting.

(4) Market Planning Conference—Atlanta District.

(5) R. D. Harvey's meeting presenting the General Counsel of the MA who

discussed government activities affecting food distribution.

Discussed with Howard Stebbins of Little Rock the possibility of his company acquiring the balance of a county now split between their plant at Harrison and the Rogers, Arkansas, Bottler.

Berrien Sutton advised that Dan Burke of Capital Cities Broadcasting was not interested in pursuing the acquisition of St. Louis at this time. Through Homer Burrous, the interest of the WGN people in Chicago is now being explored.

The Bottlers in Allendale, Denmark and Orangeburg—after almost five years—are still attempting to reach agreement on merging these three operations. Presently the completion of the merger is being delayed awaiting an offer from the Rainwater Group in Columbia to merge all three territories with Columbia, or buy them.

Participated in meeting with the Pennsylvania Bottlers in Philadelphia on the subject of a Bottler operated canning facility, and subsequently prepared a written

report on the meeting.

Met with Mr. Stanley Kreimer and Mr. Richard Childs of Mount Vernon Investment Company to discuss the possibility of this group acquiring one of our bottling plants. Reportedly, one of the DuPonts is a silent partner behind the investment company, and Mr. Kreimer states they are prepared to invest anywhere from \$5 million to \$15 million. Their plans for a plant they might succeed in buying would include allowing management to participate in ownership. He emphatically stated their interest is long range and they would not expect an immediate return on their investment.

Continued to obtain and organize answers to all questions submitted by Bottlers in connection with the Marketing Committee meeting of the Coca-Cola

Bottlers' Association.

Organized and distributed Monthly Report for April.

## COCA-COLA—APRIL 30, 1970

To: Mr. Richard D. Harvey From: George C. Trippe

Merger Seminars for BSD Field personnel held for North Central Region, Western Region and Eastern Region. Participation and reception of the material

continues at a high level.

Meetings were held with Tom Moore, Jr. (Minneapolis); Sam Woodson (Fort Worth); and John Hayes (Spokane) to discuss our long range plans and objectives for consolidations. These Bottlers were receptive and all indicated an interest in working with their Area Managers and Bottler Consolidations Department as specific plans are developed.

Met with Al Pickhardt and Dee Jackson to discuss handling of the con-

solidation program at future "Charter House" sessions.

Interviewed by Mrs. McRae of the Coca-Cola Bottler on functions of the Department, using question and answer format. The interview is scheduled for the May issue and hopefully will clarify the Company's position with regard to the future of smaller Bottlers.

Met with Barrie Mackenzie of Arthur G. McKee & Company, Engineers and Contractors, who was looking for possible business in building production centers. Advised Mr. Mackenzie his interest was a little premature and suggested he continue with his present contacts in Corporate Engineering and

Completed memorandum to Fred Dickson, with copy to Paul O'Brien, on negotiations with SMS Investors Associates, Inc., in connection with that group's

efforts to buy Columbus, Georgia.

Attended Marketing Committee Meeting.

With Jack Martin, Fountain Department Regional Manager, called on Edward Redstone of Redstone Theaters. This important customer of the Fountain Department is interested in acquiring some of our bottling plants. This company is family owned and has substantial capital available. Jack Martin reports they manage their operations in an above average manner. Redstone looks like a good prospective buyer if a big enough operation becomes available.

George Overend spent time in Los Angeles, San Francisco and Atlanta working up a preliminary recommendation on the West Coast Project. He provided continuing supervision to the study team working on the Mashburn Study. Initial

presentation to the Mashburns scheduled for May 1-2.

Senator Hart. We are delighted that a principal sponsor of one of the bills that is pending before us, S. 3133, has been able to adjust his schedule and is present to testify. The committee welcomes the able Senator from Kentucky, Senator Marlow Cook.

# STATEMENT OF HON. MARLOW COOK, SENATOR FROM THE STATE OF KENTUCKY

Senator Cook. Thank you, Mr. Chairman. You and I seem to spend mornings together these days.

Senator HART. We do and afternoons and evenings.

Senator Cook. That is right.

I have a short statement, Mr. Chairman, And I wish to thank you

for giving me this opportunity to testify.

In my State the soft drink industry is composed of many fine small companies who serve their local communities. In Kentucky there are 49 firms with 62 soft drink plants in 37 different communities. These plants employ approximately 3,600 Kentuckians with a payroll in excess of \$25 million per year.

Now, the combined gross sales for these plants is over \$150 million per year. However, what I find most important is that most of these soft drink bottlers are defined as small businesses by the Small Business

Administration.

It is interesting to note that 47 of those bottling plants employ less than 49 persons per plant; and only nine plants employ as many as 99;

and only six bottling plants have over 100 employees.

We are not, certainly, speaking in terms of large corporate enterprises, much less a giant conglomerate. We are talking about small businessmen, those people who are the backbone of communities all across this country.

Now, the recent Federal Trade Commission action requiring intrabrand competition as opposed to interbrand competition will, in my mind, destroy these small businesses. The large producers will become

larger at the expense of the small ones.

These small businesses, in attempting to compete, will be placed in an unfavorable position relative to financial assistance. Years of financial investments will be ruined for these small owners and, as a result, soft drink manufacturing will be concentrated in a small

group who have the financial wherewithal.

I might say, Mr. Chairman, to give you an example—when similar action was taken some years ago in the dairy industry, if the chairman will remember, there were then some 5,000 independent dairy bottlers in the United States. As a result of action that was taken then, there are now 200. So we have lost all of those as a result, and now we say that it is for the better interest of competition.

Encouraging the FTC action will result in a monopoly for a few,

including the grocery store chains.

In Kentucky, the number of soft drink plants could be reduced to as low as 10. Much of the business of these 62 small bottlers would be

taken over and integrated into the food chain system.

Louisville, the largest city in Kentucky, and Cincinnati, Ohio, are the major food distribution centers for Kentucky at the present time. Should the FTC prevail, their position would be greatly enhanced at the expense of the 60 small bottlers outside of Louisville.

This could be disastrous to the many medium and small communities who derive a substantial portion of their tax base from these bottlers.

Mr. Chairman, as many as 35 communities in Kentucky could lose their local bottlers, resulting in loss of taxes and loss of jobs. Further, another adverse effect of the FTC action would certainly be an increase in the price of soft drinks to consumers living outside the major bottling communities. With small, independent grocers no longer able to receive their soft drink supplies from local bottlers, they will be forced to pay retail prices for the product, and pass this increased expense on to the consumer.

Therefore, I urge the committee to study this matter very closely. I believe that a thorough and objective study will result in the passage

of legislation necessary to nullify the FTC action.

Mr. Chairman, I noticed yesterday in the newspaper, relative to these hearings, a statement that unless the small bottler can grow larger, he has no choice but to sell out to someone who already has the resources to meet the demands.

Well, now, Mr. Chairman, he grows larger because his community grows larger. He grows larger because the entire United States is

increasing in population.

The bottler at Barberville grows larger because the entire area becomes larger. The college campus population increases every year. This is how he grows larger. He does not have to compete with the bottler in Louisville who services a community of over a million people. He cannot, and should not, be forced to do so.

I would suggest that a good analysis by the committee be made of some rural bottlers in the United States. Study the bottler in Elizabethtown, Ky., or the bottler in Shelbyville, Ky., and see the increase in the population in the area in which he has a plant. See how this country has really grown in all sections, and see how the bottler's growth is really the capability of the area in which he lives to grow.

He does not have to be concerned about whether he can get into another particular area or not; but he knows that the potential of the Louisville bottler or the Lexington bottler is such that it can easily put him out of business, and that he would lose the resources and the jobs

and the capabilities that are now in the community in which he is

located.

So I wish, with all seriousness, that you would look into this matter. Because, if we are looking at the same situation as it applied to the dairy industries some years ago, then maybe we are also looking at a reduction in the bottling capacity within the independent communities and independent franchises throughout the United States by some 80 percent, as we looked at it in regard to the dairy business some

Mr. Chairman, I wish to thank you.

Senator Hart. Thank you very much. I think your counsel that we remember the experience with the dairy industry is sound. I hope we would be mindful of it, even if you had not come.

We certainly are honored, Senator Cook. Senator Cook. Thank you, Mr. Chairman.

Senator Hart. As indicated yesterday, a recess will be taken at or about 10 o'clock, in order that—I was going to say the committee but at least I can attend a caucus scheduled for that hour.

Among other unknown things around here is how long we will take in caucus, so the recess has to be sort of open-minded. But I would

anticipate that it will be about an hour.

If we can find some member of the subcommittee who is not eligible to go to this caucus, mainly a Republican, to chair the hearings, we will attempt to accommodate the witnesses by proceeding at an earlier

So if the witnesses would more or less stay in touch with the staff,

maybe we can begin before the hour.

(Whereupon, a brief recess was taken at 9:55 a.m.)

Senator Fong. The hearings will now resume. Senator Hart has

been called away and I have been asked to chair the meeting.

Our first witness will be Mr. Arthur D. MacDonald of Los Angeles. Mr. MacDonald is with the Coca-Cola Bottling Co. of Los Angeles. Good morning, Mr. MacDonald.

Mr. MacDonald. Good morning, Senator.

# STATEMENT OF ARTHUR D. MacDONALD, PRESIDENT, COCA-COLA BOTTLING CO. OF LOS ANGELES

Mr. MacDonald. I would like to introduce our counsel, Mr. John Hussey of the firm of Sheppard, Mullin, Richter & Hampton, who is

with me here at the table.

And also, in the interest of conservation of time, which the Senator has asked, I have eliminated some portions of my remarks and will try and stay within the time frame that has been previously indicated, but would like the entire statement as part of the record.

Senator Fong. The entire statement will be received as if read

before us.

Mr. MacDonald. Thank you, Senator.

(The document follows. Testimony resumes on p. 201.)

## STATEMENT OF ARTHUR D. MACDONALD

Mr. Chairman, members of the subcommittee, my name is Arthur D. Mac-Donald. I am the President and Chief Executive Officer of the Coca-Cola Bottling Company of Los Angeles. I am here at the request of Senator Hart, who asked me to testify with respect to the bills before you relating to territorial arrangements traditional in trade-mark licensing agreements in the food products area.

In order to give context to my remarks I would like to set forth a brief description of Coca-Cola Bottling Company of Los Angeles and the unique competitive environment in which we find ourselves.

Our Company is principally engaged in the processing and marketing of Coca-Cola and other soft drinks in the Los Angeles metropolitan area. In addition to Coca-Cola, we process and market in various parts of our territories other soft drinks licensed by The Coca-Cola Company including Tab, Fresca, Sprite and Simba. We also process and sell soft drinks licensed to us by others including the Canada Dry line in the Los Angeles-Orange County area. Our company produces and markets its own flavor lines of soft drinks and engages in custom packing for others.

Through our subsidiary, Arrowhead Puritas Waters, Inc., we produce and

market bottled and industrial water and water related products.

The Company acquired its first franchise to bottle Coca-Cola in 1923 at a time when the Company was family owned and Los Angeles County and Orange County combined had a population of under one million. Until 1956 the Company marketed a single product (Coca-Cola) in a single container (the six and one-half ounce returnable bottle) by a single method of distribution (route sales). The customer configuration was composed primarily of small privately owned outlets. Since that date our Southern California marketing area has grown to a population of approximately nine million and has been the pacesetter in establishing new products, new containers, and new methods of distribution. This period has seen an almost total change in the customer and in marketing methods. To understand our present competitive position one must understand the developments in our markets of the last 15 years and their impact on the traditional territorial franchising system.

The principal factors bringing about changes in our industry have been the rapidly growing population, a unique, widely dispersed geographic area and rising consumer affluence. These factors have created an enlarged natural marketing area with attendant high distribution costs and an ever increasing demand for

convenience and variety.

These factors have manifested themselves in a number of interrelated ways. They have given rise to the growth of chain markets and chain convenience stores, and the decline of the "Mom and Pop" type of store. In our principal marketing area, chain sales currently approximate 82% of total food store sales, representing one of the highest levels of chain concentration in the country. Additional small and large food stores, generally not affiliated with chains, have established buying cooperatives. The principal cooperative in California is one of the largest in the world with annual food distribution to its approximately 2,200 members of a value of \$700,000,000. As customers tended to concentrate they developed strong buying power because of the large volumes attributable to a single customer. These chains and cooperatives normally serve all markets within their organization from one or more centrally located warehouses. This has resulted in service by the principal cash and carry wholesaler, the principal cooperative and some chains to all of Southern California and portions of Nevada. While most of their sales are made in the highly populated areas near their distribution centers, this is obviously a larger natural marketing territory than was envisioned by The Coca-Cola Company when the original franchises were granted.

Packaging changes, particularly the growth of cans and one-way bottles for soft drinks, also began in a significant way in Southern California. Cans constituted 1% of our case sales in 1963. In 1971, non-returnable containers accounted for 69% of our case sales. One-way containers enabled chains and cooperatives for the first time to handle soft drink distribution through their warehouse system rather than the traditional route sales delivery method. This factor accelerated the trend to convenience packaging. Here again, the drafters of the franchise could not then foresee the effect that non-returnable containers would have on their original concept of a natural distribution area. A side effect of the development of one-way containers has been the decline in trippage for returnable containers. In the early sixties our returnable containers could be used an average of 25 times, whereas now the average has dropped to 10, a reflection of consumer attitudes and affluence. This has resulted in increased cost pressure on the bottler's returnable sales at the same time that he is forced to absorb some of the higher cost of the one-way containers.

One-way containers also facilitated the development of private labels by the larger chains. Early in the sixties, approximately 12 private label soft drinks were introduced in Los Angeles. In addition to private labels, regional brands were attracted to the chain market. These private labels and regional brands were almost exclusively in cans which caused competitive pressure on the major labels to utilize this form of container. We estimate that the consumer now has available a choice among approximately 50 different trade-mark brands compared

with one-half that number a decade ago. The effect of this competition is very evident. Statistics for grocery store sales in the Los Angeles metropolitan area indicate that private labels combined with regionally produced brands aimed primarily at chain store distribution now account for 35%-40% of the off-premise market. This percentage is uniquely high to Los Angeles by reason of the early development in our area of cans and the advanced state of the chain warehouse systems. Contrary to the Federal Trade Commission Staff's assertion, these sales were achieved at the expense of the major advertised brands, including Coca-Cola. Our market statistics also indicate that no major advertised brand accounts for more than 15% of the off-premise sales. This erosion in market share of the advertised brands has in large measure been attributable to the chain stores control of shelf space and favorable pricing of private labels and regional brands made possible by many factors, including almost exclusive use of the chain distribution system for

these products.

The full service franchised bottlers have had to respond to this pricing competition. They have found it essential to use every effort to reduce production costs by increasing volume and efficiency. This job has been made all the more difficult by a proliferation of container sizes, all aimed at convenience or economy for the particular consumer. This has placed new cost pressures on the bottler. Newer and faster canning and bottling lines are required in order to reduce production costs and to offset increased labor rates which at a current rate of approximately \$5 per hour, including fringe benefits, are among the highest in the nation. Equipment becomes obsolete more rapidly with changes in container sizes and packaging innovations. A high speed soft drink can line today costs between \$750,000 and \$1,000,000 depending on the size and support equipment. To justify this investment requires an annual volume of 4 to 5 million cases. It is obvious that these installations become possible only for the larger volume entities, again a situation not envisioned in the early years of the industry when franchise boundary lines were established.

In order to achieve the volumes required for economical production, bottlers have found it necessary to market more than one brand. As brands have proliferated, a single brand cannot develop the sales necessary to be competitive on a cost basis in our marketing area. The producing of multiple brands has had the end result of lowering cost of production and distribution and has not destroyed interbrand competition which exists in our market area on every level.

Multibrand bottling has also facilitated entry of new brands.

Another factor leading to larger natural distributive markets has been the increased use of media in recent years. Our advertising on television and radio reaches a larger area than our franchise territories. Thus, our marketing programs and promotions have an effect on surrounding bottlers, often beneficial, but sometimes not, and often confusing to dealers where surrounding bottlers

have variances in product lines and promotional practices.

The end result of the foregoing factors has been the development of a highly competitive, rapidly changing soft drink market place. The competition has been in the areas of quality, service, convenience and price. Whereas until the late fifties soft drinks were "fair traded" in California, now competition on a price basis is aggressive, not only against the "private labels" and regional brands previously discussed, but also among the major brands. "Off price promotions" are used year round by one or another of the major brand producers. The result is widely varying prices within marketing areas and competitive pricing benefits to the consumer. For example, in 1962 12-ounce Coca-Cola retailed for 6/59 cents, while today its usual retail price is approximately 6/87 cents, but it is often sold at from 6/79 cents to 6/59 cents. Our recently introduced 32-ounce returnable bottle of Coca-Cola brings the retail price on a per ounce basis to the level that Coke was retailed in 1950, this in spite of substantial increases in the costs of labor and packaging during this period.

Among our six major soft drink competitors we find three to be part of billion dollar multinational companies. Although we do not characterize ourselves as small, it is necessary to put our size in proper perspective in relation to our competitors. We also do not mean to infer for a moment that large size in itself is an evil, since economies of scale are thereby made possible with resulting

benefits to the consumer.

Approximately 50% of the Coca-Cola sold in our territory is sold in post-mix syrup form. We have no exclusivity with respect to Coca-Cola sold in this form and compete with scores of distributors who purchase the product in bulk from The Coca-Cola Company as do we. Post-mix syrup is utilized in the on-premise market where it is mixed on a per drink basis. Over the years our on-premise bottle market has been eroded. In 1960, it accounted for approximately 50% of total volume as opposed to approximately 30% in 1971.

While vigorous competition exists, increased cost pressures attack the bottler from every side. For example, packaging costs as a percentage of sales have gone from 11.8% in 1965 to 25.3% in 1971 due in part to the conversion to one-way containers. Labor rates have also increased dramatically and the cost of complying with government regulations for quality control and safety is ever increasing. Capital outlays likewise have grown substantially to satisfy our con-

tractual obligation to fully service our territories.

To combat rising costs we, as well as other soft drink manufacturers in our marketing area, have attempted to consolidate production and distribution facilities to achieve economies of scale. Only through such consolidation could

we, or they, compete effectively.

These economic forces are among the major reasons why the industry has seen a reduction in the number of bottlers. This reduction is the natural result of market forces over which we have no control but with which we must remain attuned in order to stay competitive. These forces, together with the desire by some bottlers to take advantage of our marketing experience, to combine with a larger firm, and to solve individual succession and estate problems, also explain most of our acquisitions. We now market our soft drink products through franchises covering Los Angeles and Orange County, Ventura and Santa Barbara, Fresno and the San Joaquin Valley, all in California, the Las Vegas area of Nevada, and on the Island of Oahu.

We commenced selling through central warehouses in 1960. Sales through warehousing totaled 29% of our case sales in 1971. Our experience indicates that it is essential to continue to sell through warehouses in our territory in order to protect the viability of our brands and to fulfill our obligations under our franchises to use our best efforts to promote the product through all legiti-

mate channels in our marketing area.

The chains appear to clearly prefer central purchasing and have exerted great pressure upon the bottler to utilize the warehouse mechanism even to the extent of brand discontinuance where the warehouse is not served. In our market the chains assert that product traveling through the chain warehouse in many instances reaches the consumer at lower prices than that traveling through standard store door distribution. We are unable to speak to whether these lower prices reflect the full costs of warehousing. It is important to recognize that the chain warehouse of one way containers is but one segment of an overall distribution system, albeit an important and growing one.

The aforementioned competitive pressures have eroded our profit margins. Over the past five years while soft drinks have made an approximately even contribution to our sales of approximately 72% of total revenues, income attributable to soft drinks has dropped from 71% of income before taxes in 1967 to 60% of income before taxes in 1971. Our margin of profit after taxes on

soft drink sales in 1971 was 5.25% compared with 7.92% in 1967.

It is in the foregoing context that I have been asked to present our views

on the competitive impact of the pending legislation.

As you know, the Federal Trade Commission has challenged the traditional territorial features of the soft drink franchises which we hold. It is my understanding that it is the purpose of these bills to clarify the legitimacy of territorial clauses by specifically permitting such clauses within the provisions of the Antitrust Laws.

I am aware that Mr. Rainwater, representing the National Soft Drink Association, and others believe that passage of the pending legislation would be beneficial to and preserve the equities of hundreds of smaller bottlers around the country. As a larger bottler, we also favor the legislation on the grounds that it would be beneficial to our Company as well as to the small bottler and the consumer.

We believe that passage of the legislation would serve to preserve a franchise system which has resulted in a highly competitive, healthy soft drink industry. This system has provided our company with its foundational growth, has enabled us to develop our marketing area and to maximize availability to the consumer of the brands we distribute, and has thus created both a tangible and intangible value to these brands which it is in our best interest to protect.

This system has been an instrument to develop the deepest distribution and the highest level of availability of any product in the country. It has also resulted in benefits to the consumer in total availability of product at competitive prices. It is important to note that the chain warehouse business presently represents the smaller segment of the total off-premise business. As previously noted, although important and growing chain warehousing represents but one avenue of distribution and can never effectively constitute the sole method to serve the total consumer market. The FTC Staff has apparently geared its thinking of the industry around this one segment of the business ignoring the effect upon that portion of the business not done in the chain warehouse.

If the Federal Trade Commission proceedings were to continue and ultimately determine that territorial restrictions are unlawful, we believe there would be increased competition for the high volume customers at the expense of all other outlets. We can foresee that in the short run that portion of the consuming public purchasing through chain super markets could, though not necessarily would, benefit from temporary price reductions brought about by this artificially imposed intra-brand competition. However, during this period the remaining larger segment purchasing product that has traveled through other distribution channels would either pay higher prices or be deprived of service since bottlers would be forced either to charge more to their remaining customers or discontinue high cost distribution to the small retailer. In addition, termination of territorial restrictions would inevitably increase the rate of conversion to one-way containers and make unavailable to the consumer the more economical returnable container.

During this temporary period of intra-brand competition for chain volume, all parties could feel the effect of such increased competition in an already highly competitive consumer price environment. The impact of such competition would result in a reduced ability to commit capital to the growth of the industry and a reduced ability to fully service the territory. As a result, the brands we sell will be injured across the board. As this competitive strug-

gle continues some companies will be forced out.

In the long run, we envision no significant pricing benefit to the consumer since the survivors of the price competition will endeavor to return to the profit levels on all segments of the business which levels make a viable growing business entity possible. At the same time present wide distribution of the

product may then have been irretrievably lost.

Another reason for our support of the proposed legislation is that it would permit an orderly transition of our industry into more natural trading areas which ultimately will result. It is an economic fact that as market areas become larger in terms of population and as distribution methods adjust to serve larger numbers in larger territories, larger bottlers are required to efficiently serve them. As previously indicated, the soft drink business requires a heavy capital investment and high volume is essential to effective price competition. The shift to warehousing and non-returnable containers demanded by super markets has materially increased the territory that a single business entity can effectively service. Thus, we believe that the number of bottlers ten years from now will be fewer than it is today. This reduction will occur regardless of whether the bills presently before your subcommittee pass or fail.

Since with or without territorial restriction the number of bottlers will be reduced, the true issue to which we should address ourselves is how we can best assure that the transition will be an orderly one. We believe that the passage of the proposed legislation would most effectively enable these entities to come

together to meet the changing market place.

With the protection of territorial provisions, smaller bottlers can, if they so choose, combine with other neighboring bottlers, large or small, and in so doing receive a fair measure of compensation for their equity positions built up during many years when nobody questioned the validity of their contractual arrangements. Upon removal of limited protection of the present territorial clauses, there would be no proper value that can be placed on the franchise of a bottler and the short term competitive struggle previously described would necessarily

occur. Such struggle will not ultimately benefit the consumer, but will likely

diminish or destroy the equity of many bottlers.

As you know, the bills before you would permit a franchisor to restrict sales to those made only for ultimate resale to consumers within a defined geographic territory. We believe that it would be a mistake for a franchisor of a national brand to attempt to utilize such provisions to preclude transportation of its brand through warehouses in the bottler's territory which serve substantial portions of the bottler's territory. We believe that warehousing is and will continue to be one of the essential channels for soft drink distribution and some means should be provided for its continued use.

At one point in time we endeavored to make financial arrangements with neighboring bottlers with respect to canned goods that might incidentally be delivered by our respective customers into the others' territories. We discontinued this effort over four years ago when we determined that it could be of doubtful legality. However, should the legality of territorial limitations upon the customer's disposition of goods to the ultimate consumer be confirmed by the proposed legislation there could again be some form of equitable compensation developed to handle the possible incidental overflow of product into neighboring territories which would have a tendency to negate the concerns over

central warehousing.

The present franchising arrangements have been of benefit to the franchisors. The franchise system has enabled bottlers to fully service their territories and has resulted in increased volume to the franchiseor without the necessity of its making the substantial capital outlays required. Termination of the territorial limitations could well result in reduced total volume of sales as brand distribution deteriorates and conceivably the franchisors would find it necessary to assume a primary position in competing for chain volume to restore lost profits,

We believe the existing historical relationship should be preserved.

Our counsel have had a brief opportunity to examine the papers relating to the recent motion for summary judgment filed by the Federal Trade Commission in the proceedings against the syrup companies. In those papers the Staff complaint counsel take the view that if territorial restrictions are found illegal per se, an appropriate remedy in part would be to permit some bottlers to compete without regard to territorial restrictions while requiring certain metropolitan bottlers to abide by the territorial restrictions contained in their franchise agreements as to smaller bottlers' territories for a period of ten years. This suggestion reinforces our belief that the question of territoriality should be resolved by Congress. Although we are not a party to those proceedings, the "remedy" suggested by complaint counsel would place us in a totally unfair competitive position. We would be singled out and placed at a competitive disadvantage to our neighbors although we neither initiated the territorial restrictions nor were we responsible for the natural forces which caused our principal marketing area to grow. If the FTC proceedings continue, we will be forced to do everything in our power to oppose this type of solution which would be contrary to all basic economic, equitable and legal principles. We have over 2.500 employees and 5,000 shareholders whose interests would be ignored by such an order.

In conclusion I would like to state that as our published figures demonstrate, we are not presently the beneficiary of unreasonable profits symptomatic of a monopolistic position. Rather, our margins reflect the vigorous competitive market in which we find ourselves. Our industry is capital intensive, and a reasonable return to investors is essential to its orderly growth and development.

The proposed legislation would preserve the legality of the basic territorial provisions upon which the industry was founded and upon which both the small and large businessman has relied for many years. We believe that the soft drink industry as it has evolved has been most beneficial to the consumer and that through natural processes of change within the existing franchise system the industry will continue to be dynamic and competitive.

We are grateful to the Committee for giving us the opportunity to express

these views.

Mr. Chairman, members of the subcommittee, my name is Arthur D. MacDonald. I am the president and chief executive officer of the Coca-Cola Bottling Co., of Los Angeles. I am here at the request of Senator Hart, who asked me to testify with respect to the bills before

you relating to territorial arrangements traditional in trademark licensing agreements in the food products area.

In order to give context to my remarks, I would like to set forth a brief description of Coca-Cola Bottling Co., of Los Angeles, and the

unique competitive environment in which we find ourselves.

Our company is principally engaged in the processing and marketing of Coca-Cola and other soft drinks in the Los Angeles metropolitan area. In addition to Coca-Cola, we process and market in various parts of our territories other soft drinks licensed by the Coca-Cola Co., including Tab, Fresca, Sprite, and Simba.

We also process and sell soft drinks licensed to us by others including the Canada Dry line in the Los Angeles metropolitan area and in the Orange County area. Our company produces and markets its own flavor lines of soft drinks and engages in custom packing for

others.

The company acquired its first franchise to bottle Coca-Cola in 1923, at a time when the company was family owned and Los Angeles County and Orange County combined had a population of under a

Until 1956, the company marketed a single product, Coca-Cola, in a single container, the 61/2 ounce returnable bottle, by a single method of

distribution, route sales.

The customer configuration was composed primarily of small privately owned outlets. Since that date, our southern California marketing area has grown to a population of approximately 9 million and has been the pacesetter in establishing new products, new containers, and new methods of distribution. This period has seen an almost total change in the customer and in marketing methods.

The principal factors bringing about changes in our industry have been the rapidly growing population, a unique, widely dispersed geographic area and rising consumer affluence. These factors have created an enlarged natural marketing area with attendant high distribution costs and an ever-increasing demand for convenience and variety.

These factors have manifested themselves in a number of interrelated ways. They have given rise to the growth of chain markets and chain convenience stores, and the decline of the "Mom and Pop" type of

In our principal marketing area, chain sales currently approximate 82 percent of total foodstore sales, representing one of the highest

levels of chain concentration in the country.

Additional small and large foodstores, generally not affiliated with chains, have established buying cooperatives. The principal cooperative in California is one of the largest in the world with annual food distribution to its approximately 2,200 members of a value of \$700 million.

As customers tended to concentrate, they developed strong buying power because of the large volume attributable to a single customer. These chains and cooperatives normally serve all markets within their organization from one or more centrally located warehouses.

Packaging changes, particularly the growth of cans and one-way bottles for soft drink, also began in a significant way in the southern California market. Cans constituted 1 percent of our case sales in 1963.

In 1971, nonreturnable containers accounted for 69 percent of our

total case sales. One-way containers enabled chains and cooperatives for the first time to handle soft drink distribution through their warehouse system rather than the traditional route sales delivery method. This

factor accelerated the trend to convenience packaging.

One-way containers also facilitated the development of private labels by the larger chains. Early in the sixties, approximately 12 private label soft drinks were introduced in Los Angeles. In addition to private labels, regional brands were attracted to the chain market. These private labels and regional brands were almost exclusively in cans which caused competitive pressure on the major labels to utilize this form of container.

The effect of this competition is very evident. Statistics for grocery store sales in the Los Angeles metropolitan area indicate that private labels combined with regionally produced brands aimed primarily at chainstore distribution now account for some approximately 35 per-

cent to 40 percent of the off-premise market.

This percentage is uniquely high to Los Angles by reason of the early development in our area of cans and the advanced state of the chain warehouse systems. Contrary to the Federal Trade Commission staff's assertion, these sales were achieved at the expense of the major advertised brands, including Coca-Cola.

Our market statistics also indicate that no major advertised brand

accounts for more than 15 percent of the off-premise market.

The full-service franchised bottlers have had to respond to this pricing competition. They have found it essential to use every effort to

reduce production costs by increasing volume and efficiency.

This job has been made all the more difficult by a proliferation of container sizes, all aimed at convenience or economy for the particular consumer. This has placed new cost pressures on the bottler. Newer and faster canning and bottling lines are required in order to reduce production costs and to offset increased labor rates which at a current rate of approximately \$5 per hour, including fringe benefits, are among probably the highest in the Nation.

Equipment becomes obsolete more rapidly with changes in container sizes and packaging innovations. A high-speed soft-drink can line today costs between three-quarters and a million dollars, depending on the size and support equipment involved. To justify this investment

requires an annual volume of 4 to 5 million cases.

It is obvious that these installations became possible only for the larger volume entities, again a situation not envisioned in the early years of the industry when franchise boundary lines were established.

In order to achieve the volumes required for economical production, bottlers have found it necessary to market more than one brand. As brands have proliferated, a single brand cannot develop the sales necessary to be competitive on a cost basis in our marketing area.

The producing of multiple brands has had the end result of lowering cost of production and distribution, and has not destroyed the interbrand competition which exists in our market area at every level. Mul-

tibrand bottling also has facilitated entry of new brands.

The end result of the foregoing factors has been the development of a highly competitive, rapidly changing soft drink marketplace. The competition has been in the areas of quality, service, convenience, and price. Whereas until the late fifties soft drinks were fair traded in California, now competition on a price basis is aggressive, not only against the private labels and regional brands previously discussed, but also among the major brands.

Off-price promotions are used year round by one or another of the major brand producers. The result is widely varying prices within marketing areas and competitive pricing benefits to the consumer.

For example, in 1962, 12-ounce Coca-Cola retailed for six for 59 cents, while today its usual retail price is approximately six for 87 cents, but it is often sold at from six for 79 cents to six for 59 cents.

Our recently introduced 32-ounce returnable bottle of Coca-Cola brings the retail price on a per ounce basis to the level that Coke was retailed in 1950, this in spite of substantial increase in the costs of labor and packaging during this period.

While vigorous competition exists, increased cost pressure attacks the bottler from every side. For example, packaging costs as a percentage of sales have gone from 11.8 in 1965 to 25.3 in 1971, due in

part to the conversion to one-way containers

To combat rising costs, we, as well as other soft drink manufacturers in our marketing area, have attempted to consolidate production and distribution facilities to achieve some economies of scale. Only through such consolidation could we, or they, compete effectively.

These economic forces are among the major reasons why the industry has seen a reduction in the number of bottlers. This reduction is the natural result of market forces over which we have no control but with which we must remain attuned in order to stay competitive.

We commenced selling through central warehouses in 1960. Sales through warehousing totaled 25 percent of our case sales in 1971. Our experience indicates that it is essential to continue to sell through warehouses in our territory in order to protect the viability of our brands and to fulfill our obligations under our franchises to use our best efforts to promote the product through all legitimate channels in our marketing area.

The chains appear to clearly prefer central purchasing and have exerted great pressure upon the bottler to utilize the warehouse mechanism even to the extent of brand discontinuance where the ware-

house is not served.

In our market, the chains assert that a product traveling through the chain warehouse in many instances reaches the consumer at lower prices than that traveling through standard store-door distribution. We are unable to speak to whether their lower prices reflect the full costs of warehousing. It is important to recognize that the chain warehouse of one-way containers is just one segment of an overall distribution system, albeit an important and growing one.

The aforementioned competitive pressures have eroded our profit margins as well as our market share over the past 5 years, while soft drinks have made an approximately even contribution to our sales of approximately 72 percent of total revenues. Income attributable to soft drinks has dropped from 71 percent of income before taxes in 1967, to 60 percent of income before taxes in 1971. Our margin of profit after taxes on soft drink sales in 1971 was 5.25 percent, compared with some 7.92 percent in 1967.

It is in the foregoing context that I have been asked to present our

views on the competitive impact of the pending legislation.

As you know, the Federal Trade Commission has challenged the traditional territorial features of the soft drink franchises which we hold. It is my understanding that it is the purpose of these bills to clarify the legitimacy of territorial clauses by specifically permitting

such clauses within the provisions of the antitrust laws.

We believe that passage of the legislation would serve to preserve a franchise system which has resulted in a highly competitive, healthy soft drink industry. This system has provided our company with its foundational growth, has enabled us to develop our marketing area and to maximize availability to the consumer of the brands we distribute, and has thus created both a tangible and intangible value to these brands which it is in our best interest certainly to protect.

This system has been an instrument to develop the deepest distribution and the highest level of availability of any product in the country. It has also resulted in benefits to the consumer in total availability

of product at competitive prices.

It is important to note that the chain warehouse business presently represents a smaller segment of the total off-premise business. As previously noted, although important and growing, chain warehousing represents but one avenue of distribution and can never effectively constitute the sole method to serve the total consumer market.

The FTC staff has apparently geared its thinking of the industry around this one segment of the business, ignoring the effect upon that

portion of the business not done in the chain warehouse.

If the Federal Trade Commission proceedings were to continue and ultimately determine that territorial restrictions are unlawful, we believe there would be increased competition for the high-volume customers at the expense of all other outlets. We can foresee that in the short run, that portion of the consuming public purchasing through chainstore markets could, though not necessarily would, benefit from temporary price reductions brought about by this artificially imposed intrabrand competition.

However, during this period, the remaining larger segment purchasing product that has traveled through other distribution channels would either pay higher prices or be deprived of service since bottlers would be forced either to charge more to their remaining customers or discontinue high-cost distribution to the smaller retailer.

In addition, termination of territorial restrictions would inevitably increase the rate of conversion to one-way containers and make unavailable to the consumer the more economical returnable container.

During the temporary period of intrabrand competition for chain volume, all parties could feel the effect of such increased competition in an already highly competitive consumer price environment.

The impact of such competition would result in a reduced ability to commit capital to the growth of the industry and a reduced ability to fully service the territory. As a result, the brands we sell will be injured across the board. As this competitive struggle continues, some

companies will be forced out.

In the long run, we envision no significant pricing benefit to the consumer since the survivors of the price competition will endeavor to return to the profit levels on all segments of the business, which levels make a viable growing business entity possible. At the same time, present wide distribution of the product may then have been irretrievably lost.

Another reason for our support of the proposed legislation is that it would permit an orderly transition of our industry into more natural trading areas which ultimately will result. It is an economic fact, we believe, that as market areas become larger in terms of population, and as distribution methods adjust to serve larger numbers in larger territories, larger bottlers are required to sufficiently serve them.

Since with or without territorial restriction, the number of bottlers will be reduced, the true issue to which we should address ourselves is how we can best assure that the transition will be an orderly one. We believe that the passage of the proposed legislation would most effectively enable these entities to come together to meet the changing

marketplace.

With the protection of territorial provisions, smaller bottlers can, if they so choose, combine with other neighboring bottlers, large or small, and in so doing receive a fair measure of compensation for their equity positions built up during many years when nobody questioned

the validity of their contractual arrangements.

Upon removal of limited protection of the present territorial clauses, there would be no proper value that can be placed on the franchise of a bottler, and the short-term competitive struggle previously described would necessarily occur. Such struggle will not ultimately benefit the consumer, but will likely diminish or destroy the equity of many bottlers.

At one point in time, we endeavored to make financial arrangements with neighboring bottlers with respect to canned goods that might incidentally be delivered by our respective customers into the others' territories. We discontinued this effort over 4 years ago when we

determined that it could be of doubtful legality.

However, should the legality of territorial limitations upon the customer's disposition of goods to the ultimate consumer be confirmed by the proposed legislation, there could again be some form of equitable compensation developed to handle the possible incidental overflow of product into neighboring territories, which would have a tendency to negate the concerns over central warehousing.

Our counsel have had a brief opportunity to examine the papers relating to the recent motion for summary judgment filed by the Federal Trade Commission in the proceedings against the syrup

companies.

In those papers, the staff complaint counsel take the view that if territorial restrictions are found illegal per se, an appropriate remedy in part would be to permit some bottlers to compete without regard to territorial restrictions while requiring certain metropolitan bottlers to abide by the territorial restrictions contained in their franchise agree-

ments as to smaller bottlers' territories for a period of 10 years.

The suggestion reinforces our belief that the question of territoriality should be resolved by Congress. Although we are not a party to those proceedings, the "remedy" suggested by complaint counsel would place us in a totally unfair competitive position. We would be singled out and placed at a competitive disadvantage to our neighbors, although we neither initiated the territorial restrictions nor were we responsible for the natural forces which caused our principal marketing area to grow.

If the FTC proceedings continue, we will be forced to do everything in our power to oppose this type of solution which would be contrary to all basic economic, equitable, and legal principles. We have over 2,500 employees and 5,000 shareholders whose interest would be ignored by such an order.

The proposed legislation would preserve the legality of the basic territorial provisions upon which the industry was founded and upon which both the small and large businessman has relied for many years.

We believe that the soft drink industry as it has evolved has been most beneficial to the consumer, and that through natural processes of change within the existing franchise system, the industry will continue to be dynamic and competitive.

We are grateful to the committee for giving us the opportunity to

express these views.

Senator Fong. Mr. MacDonald, would you say that your company in Los Angeles is one of the largest distributing companies?

Mr. MacDonald. I would judge we would probably be in the top 10

or so, categorized in the soft drink business.

Senator Fong. I see. And being in the top 10, you would be able to withstand competition much better than some of the smaller dealers? Mr. MacDonald. I would think that where we are centrally located

in the marketing area and have the resources, that we should certainly be as able to withstand competition as others.

Senator Fong. So, regardless of whether these bills are passed or not, you still would be in a very, very strong competitive position in rela-

tion to other competitors in the same field?

Mr. MacDonald. I think we would, Mr. Chairman, but I think there would be other overriding considerations in the short term. It would be interrelated with that competitive exercise.

Senator Fong. What I'm trying to point out is this: That you are one of the largest of the franchisees, and yet you are saying that territorial limits should be placed, and we should recognize territorial franchises.

Mr. MacDonald. Yes.

Senator Fong. Yes. Yet if these territorial franchises were eliminated and open competition were to be had, you would be in a very good position to survive as against your smaller competitors.

Mr. MacDonald. I think that would be a reasonable assumption,

Senator Fong. Yes. And as one who will be able to survive much better than many others, you still feel that these laws will be beneficial to the whole industry?

Mr. MacDonald. I do indeed.

Senator Fong. Now, in the matter of warehousing, where you deliver these goods to the warehouses, do you go across territorial lines?

Mr. MacDonald. No, we do not. We do not. We sell to our customers within the franchised territory which we have contractually—which has been contractually franchised to us. We do not sell to customers outside of those territories.

Senator Foxe. Are these warehouses situated within your terri-

Mr. MacDonald. They are indeed.

Senator Fong. But these warehouses serve stores outside of the territorial limits.

Mr. MacDonald. The vast majority of their members or the vast majority of their stores, if it were a chain, are within the boundaries of our territories.

Senator Fong. And there are some—

Mr. MACDONALD. Yes, there are some, some of their stores that would

be outside of our boundary lines.

Senator Fone. How do you go about that, under the territorial franchise! That is, doesn't your competitor protest that warehouses will

deliver to the stores outside of your territory?

Mr. MacDonald. Yes, certainly there is feeling on the part of the franchischolder in the territory in which a chainstore or a co-op would serve their store in his territory. There is, of course, a sense on his part that that is an encroachment into his territory, but it is one area over which we have had no control since the chain or the co-op make their own distribution and we don't.

We have nothing with which we are able to control his distributing

the product.

Senator Fong. I see. You make a point here that, having a territory, you try to serve all elements within the territory, the warehouses and all of the small distributors.

Mr. MacDonald. Yes.

Senator Fong. Now, if you did not have these territorial franchises and competition came in, it would be like somebody trying to cut into your utility, taking the better routes and leaving the more unprofitable routes not served. This is your thinking, is it not?

Mr. MacDonald. That's precisely the case, Senator, yes.

Senator Fong. You think that would happen?

Mr. MacDonald. There would be strong competition for the top of the pyramid or the high-volume velocity accounts, and the remainder outlets, I would think, would be much more costly to serve or would go unserved if they were unable to bear the increased cost. If it were in our instance, of course, we would likewise be competing at the top of the pyramid, and the cost for the residual market would be considerably greater, and thus those being in that market, the ultimate consumer, would have to carry, of course, the increased cost.

Senator Fong. Everybody would go after the high-profit areas?

Mr. MacDonald. Right.

Senator Fong. The low profit areas would be unserved or these areas

would even lose money where-

Mr. MacDonald. It would have some destructive effect upon the total availability concept that has made the soft drink business, really, profitable, and may be unique. I cannot think of any type of product that has the total availability that soft drinks do. There are very few places in which a soft drink cannot be obtained and certainly some of those would ultimately be eliminated by reason of the cost of service if the competition were forced to the large volume outlet alone and the struggle ensued there.

Senator Fong. Would you say the price of your drinks has not

changed materially?

Mr. MacDonald. Well, certainly the price of the drinks has, Senator, over the years, but with the more increased competition in the marketplace, it would be my experience in some three decades which I have been in the business in the Los Angeles market, there is prob-

ably more aggression, more competition, more brands on the marketplace; more sizes competing for shelf space, therefore more promotional activity going on than in the history of the 30 years which I

have been in this business.

The consequence of that is that the consumer is indeed benefited on the brand Coca-Cola and certainly on other brands by that activity, and there is at almost any given time in our city as much as 30 percent or more off of the—what you might call the suggested retail pricing of the brand.

Senator Fong. You have a suggested retail price but usually they

don't keep that suggested retail price, is that right?

Mr. MacDonald. No; they seem to have their own. Most of the chains, most of the retailers have their own pricing mechanisms against their own costs that they decide, but the traditional markups are in the 16-to 27-percent range.

Senator Fong. Do you serve unprofitable areas, too-unprofitable

outlets?

Mr. MacDonald. I think, Senator, if we took a certain segment, an individual segment of our market, and cast it entirely on its own, I would presume that we could get a characterization that it was an unprofitable outlet to serve.

Senator Fong. Because you hold the territorial franchise, you would like to see your product distributed everywhere within that territory,

is that right?

Mr. MacDonald. That is not only correct, sir; but it is one of the requirements of our franchise agreement that we make a product totally available. Not only does that requirement need to be fulfilled in a contractual sense, but it has given the viability of the brand, has given the opportunity for its growth greater than had the distribution been in a much narrower segment, or, for example, if it were totally going through the warehouse and only to the grocery outlet.

Senator Fong. Now, if this bill is not passed, how do you envision

the soft drink business would be in the future?

Mr. MacDonald. Well, I think that probably if the franchise boundary lines are eliminated, Senator—is that what your question means—well, I would believe that people would have—ownership would have considerable reluctance to make the type of capital investment that is essential to the business to make it grow and prosper, to do the consolidation, to bring the economies of scale, to bring the investments of equipment that is necessary to keep pace with the needs of the industry.

They would have great reluctance to make those kind of capital investments and certainly that would have a relativity to size, without any protection whatsoever as to whether they were going to be able to do so in any reasonable security of their investment with the boundary

lines down

They would probably seek out the more profitable end of the business, possibly eliminate, as we said before, the service to outlets that they are now serving and compete only for that volume that was able to accommodate the type of production facility that they had or the investments that they might elect to remain with.

We think that it could be quite chaotic and my final analysis would probably wind up with those who felt that they could sustain such a

long exercise and therefore diminish the number in the bottling industry at the end of that time—the very end of it.

Senator Fong. It could not increase the-

Mr. MacDonald. It could not because—by my thought processes— Senator Fong. Because a private franchise is given to a certain number of people?

Mr. MacDonald. No; it could not, it could only decrease.

Senator Fong. It could only decrease.

Mr. MacDonald. Yes.

Senator Fong. And if you have a decreased number of franchisees, then you would probably have decreases of competition?

Mr. MacDonald. Yes, yes; that could certainly ensue.

There is one competitive factor, however, Senator, that seems always present in our business, and that is the interbrand competition. We are always very conscious of the fact that other brands are competing.

Senator Fong. How much of a market has your brand—Coca-Cola—

how much of a market is it?

Mr. MacDonald. Our Coca-Cola in the Los Angeles market?

Senator Fong. Yes.

Mr. MacDonald. Our "Neilson" share of the whole market, which is the only measuring rod, is somewhere around the 11-12 percent, which is some 50 percent reduced in the last 10 years.

Senator Fong. Eleven percent of the market. Did you say, 11 per-

cent of the market?

Mr. MacDonald. Yes; which is about 50 percent of what it was 10

Senator Fong. You started at 20 percent?

Mr. MacDonald (continuing). Even though we are larger and better concentrated, the factors in the marketplace have reduced our share of the market some 50 percent in that length of time.

Senator Fong. You started at about 20 percent?

Mr. MacDonald. Yes; some 22 percent.

Senator Fong. Is your market percentage decreasing or increasing within the past few years?

Mr. MacDonald. It is roughly about static at the present time, but

it has, in the 10-year span, been reduced.

Senator Fong. And with the reduction in your percentage, has there been an increase in other name brands, or have there been increases in the private labels?

Mr. MacDonald. To our best ability to measure the market, Senator, all three of the major brands in our market have lost a share of

market in the decade.

Senator Fong. When you say, "the three major brands"—

Mr. MacDonald. I would characterize them as being Seven-Up. Pepsi-Cola, and Coca-Cola, and I would say most of that share of market has gone either to the private brands, the regional brands or those brands traveling solely thru the warehouse or to the grocery segment of the market.

Mr. BANGERT, Mr. MacDonald, you do support the legislation. Many of the witnesses that have come in in support of the legislation in the past have premised their support on the basis that this is the only way to protect the small independent franchisee and I sense that perhaps you are not in complete agreement with this because I believe you indicate that there is going to be a substantial consolidation, inevitably, whether this legislation is or is not passed; is that correct?

Mr. MacDonald. Yes, Mr. Bangert, and we don't think that is very unusual. We think that as markets grow, the need for consolidation and the need for a larger entity to serve larger markets are not uncommon, and therefore we believe that is a natural consequence rather than an unnatural one.

Mr. Bangert. Then, the technology, as I understand it, is such that

it would favor larger consolidations.

Mr. MacDonald. It would favor groupings to serve markets, if that is a consolidation. I think that—yes; it does favor consolidation.

Mr. Bangert, Now, your company has been fairly active in the past

5 years in its acquisition pattern; is that correct?

Mr. MacDonald. Yes; we have made acquisitions in the soft drink business the last few years.

Mr. Bangert. How many soft drink acquisitions have you made in

the last 5 years?

Mr. MacDonald. I think that, to be responsive, Mr. Bangert, what I believe you mean to be acquisitions, we acquired Cola-Cola Bottling Co., of Fresno in 1964, Las Vegas in 1966, Santa Barbara in 1967, the Coca-Cola Bottling Co., of Honolulu, Senator, in 1968, the Coca-Cola Bottling Co., of Ventura in 1970. I think there was a small territory called Needles which was-

Mr. Bangert. How about Phoenix, is that yours?

Mr. MacDonald. Phoenix is not ours. Mr. Bangert. How about Bakersfield?

Mr. MacDonald. Bakersfield is not ours. That is an independ-

Mr. Bangert. Now, with the exception of Honolulu, I would assume that these other acquisitions are distancewise, at least reasonably close to Los Angeles, and what I'm wondering is have the technologies been such that you have been permitted to make these acquisitions because

this permits you to increase your plant capacity?

Mr. MacDonald. Well, I think that there has been economies of scale, Mr. Bangert. I think that where we have, for example, acquired Ventura and Santa Barbara, we were able to discontinue production in those two plants and effect producing in the larger plants in Los Angeles and bringing that production to those two distributive areas at better costs than either one of those plants before that were able to do.

So we were able to get some economies by that action. We, too, in the original concept, I would think, felt that the circle was widening in our own customer's needs and to serve them was a-that was a

means, also, to serve them.

Mr. Bangert. Now, with respect to these acquisitions, how did it come to your attention, for instance, that someone wanted to sell that Las Vegas or Needles, or Santa Barbara or Ventura wanted to sell?

Mr. McDonald. Well, to my best recollection—let us take Las Vegas, there was a death in the family in Las Vegas, one of the sons of the major owner, who was pretty much the successor or the first one that was thought to be able to run that company. It took on a

completely different character when that took place and the major owner, the father, sought to make a merger with our company in order to retire from the business; he was in advanced years, feeling that he didn't have succession in management within the family that he originally had hoped he would, and we were able to make an exchange. Also, a second son remained in the business.

We made an exchange of stock on that basis and the son still remains in the production end of that company and the owner, purposes were achieved and it has been a good market and a good invest-

ment for our company.

Mr. BANGERT, Has Coca-Cola, U.S.A., assisted you in these acquisitions in terms of helping you put them together, in terms of teiling you someone was ready to be acquired or anything along that line?

Mr. MacDonald. In no instance, Mr. Bangert, did I really have that type of dialogue with Coca-Coia Co., as applied to any conversations we were having with bottlers that we were interested in merging equities. Under no circumstances did the Coca-Cola Co., initiate our acquisition. Our discussion were usually a postoperative thing or if they found out through their own organization, they may have contacted us. We did not have any predialogue with them of the type you mention.

Mr. Bangert. Well, have you or any of your officers or employees attended meetings of the Coca-Cola Bottlers' Consolidation Department in connection with their merger seminar in development of the

west coast project?

Mr. MACDONALD. No. If I understand the seminars of the west coast project, I am not aware of those in that nomenclature at all, and I have not attended anything that would characterize that.

Mr. Bangert. Now, as I understand, your products are shipped into territories of smaller neighboring Coca-Cola franchises; is that

correct?

Mr. MacDonald. We understand that some of the chains or co-ops do ship some of their product to some of their stores. We don't have current knowledge of that, but, yes; we do understand that that takes

Mr. BANGERT. How long to your knowledge, have you sold products

to warehouses or chains that do ship into adjoining terrifories?

Mr. MacDonald. My recollection is it antedates my association with the company, but when cans were originally marketed by the Coca-Cola Bottling Co., of Los Angeles, they started with that method of distribution, so it antedated my association with the company. In 1960, I would judge—1959 or 1960, in that period.

Mr. Bangert. Are you familiar with whether or not Coca-Cola, U.S.A., has taken any action or has expressed any concern with re-

spect to products being shipped into adjoining territories?

Mr. MacDonald. Well. I think that they have had an abiding concern about this for a long while. As expressed in my statement years ago, some 4 or 5 years ago, was a desire that we have some community arrangement with surrounding bottlers, and the principle of that was really that we had no desire, no predatory sense of entering those markets where we did not have franchises.

The sense was that we should continue an avenue of distribution. It was essential, in our judgment, to bring the product to market and help to keep a competitive avenue open in which other brands were

utilizing to go to that segment of the market.

Many of the bottlers saw, although I am sure, did not necessarily have an abiding desire even to be a part of that, or saw that that was necessary to do so, and were agreeable to an agreement that permitted that to continue, and they serviced the stores in that market, needed to continue to do that, so that it was a logical reason for them to receive some contribution that was worked out at that time.

Now, as I indicated, that when we were informed by our counsel— I believe it was following the *Schwinn* decision—that this could be it was a fuzzy area—that it was—could very well border on illegality, we wrote our bottlers with whom we had arrangements at that time to inform them that we felt a necessity to discontinue that arrange—

ment.

I think it is very important, however, that it be a part of the record, that this is a really very small amount of business. Yesterday, for example, I heard the testimony of Mr. Foster, and with whom I have an abiding understanding of his problem, indicate the shipment, and I asked our people to look up, see what—during those periods of time—were the shipments that were recorded for which we paid Mr. Foster's company.

As I recall, it amounted in 18 months to something approximating 1.500 case. And, as I recall, the sum was in the neighborhood of \$500 to \$600; it was a little bit more than 10 cents a case, I think it ap-

proached more like 25 cents a case.

But I think that is only to demonstrate that as best we were able to record, as best that they were able to determine what amounts were, they were really, in essence, very small amounts that were traveling over these boundary lines. They were the periphery with the main customers and with the main number of outlets within the areas in which the chain warehouse or the co-ops were serving their main customers.

I think it is good to recognize that the majority, by far, is not going

outside these territories but rather, remaining in.

Mr. Bangerr. But I would assume that maybe it would be fair to guess that probably cans were not as important at that time as they are now and that perhaps there may be larger shipments being made at this time since cans seem to be more important at this time.

Mr. MacDonald. Well, certainly cans are a larger share of the market than they were at that time, but they are certainly in no way predominant a package and I'd be glad to get that for you if that is

of import to you.

Cans through warehouse are roughly about 15 percent.

Mr. Bangert. Now---

Mr. MacDonald. Now, that is not the custom packing business, that is our brands under which we have franchises.

Mr. Bangert. But are cans a large part of the warehouse business? Mr. MacDonald. Oh, yes, I would say, of the warehouse business, that cans probably dominate in the soft drink business through the warehouses. The cans are the largest item. Yes, I would assert.

Mr. BANGERT. And that is the type of sale we are talking about that

eventually gets into adjoining territories?

Mr. MacDonald. Yes, but I think the point I am endeavoring to make is that if a chain has, for example, 80 stores, there might be 75

of them within the boundary of their warehouse and five without, to give you a dimension of the amount of stores that could have shipment outside of the main distributive area.

Mr. Bangert. I think that Mr. Foster, yesterday, gave an estimate that at any particular time 30 percent of the product in his market

was coming from outside of the area.

Mr. MacDonald. I have no knowledge, of course, of that. That would be figures privy to him. I would not know what-

Mr. BANGERT. Well, if his estimate is correct, then-

Mr. MacDonald. I would be surprised, sir, if that were so because our records would not indicate that that was coming from us.

Mr. Bangert. No, no; he did not indicate at all that you may have

been the only source.

Mr. MacDonald. Yes; I would not know if that is so.

Mr. Bangert. So if his figures were correct in figuring that he serves a population of only 20,000 people, that would be a significant portion of his business, I would assume; is that right!

Mr. MacDonald. I would accept that 30 percent of his business in

his context would be sizable.

Mr. Bangert. Now, Mr. Foster apparently has also sold to warehouses that have shipped into your territory; is that correct.

Mr. MacDonald. Yes. I do not know about warehouses. He has sold

in our territory. I do not know of warehouses in his territory.

Mr. Bangert. And he indicated yesterday in his statement that he could sell into your territory at a lower price than you charge and he could still make a profit. I am wondering whether this does not point out the importance of intrabrand competition, if intrabrand competi-

tion would be permitted to operate.

Mr. MacDonald. Well, I think that I understand the thrust of your question. I think if you took any one segment and you applied a set of economics to that one segment, if you had no investment, and you acted as a broker solely; you did not have any equipment, you did not have any trucking, you did not have any administrative cost. I would imagine that if you were able to enjoy, for whatever length of time that was privy to you, a piece of business upon which you did not have to put that overhead, that you could sell it for less money and thereby enjoy a profit.

But in the natural course of commerce, that sort of situation, we would believe, would not maintain. We do not even know whether the major owner of Mr. Foster's company, now Thriftimeat, cares whether a profit is made on these sales. We know of no established warehousing in that territory, although we can very easily see where they would have an opportunity to use that source for their own stores and their own wholesale distributive system which could be advantageous to

them.

Mr. Bangert. Well, I guess that goes to the point that you made earlier, that the operation of exclusive territorial franchise so as it now permits the whole system to be served in both large and small stores; is that right?

Mr. MacDonald. I would appreciate it if you would restate that. Mr. Bangert. Well, in other words, as I understand your response here indicating that, yes, maybe you can sell cheaper in Los Angeles if you just had to worry about chainstores or if you just had to worry

about those with warehouses that—

Mr. MacDonald. I think so, yes, if you just took the top of the pyramid and said we will not serve the rest of the market. We would only go to one segment of the market and gear your operation solely for that purpose. Yes: I would think that if you get a private label type of approach and only served that segment of the market. I think probably you could, yes, thereby operate solely in that segment of the market, and abandon the rest, or if you remained with the rest, it would have to be certainly considerably priced up.

Mr. Bangert. Yes; I think that is one of the problems that maybe bothers me. We are assuming that the small stores, the gas stations, those type of accounts would not be served without exclusive territorial franchises, yet we do know that our distribution system in this

country has been dynamic.

We have seen independent grocery stores form cooperative warehouses in order to compete with the chains. We have seen automotive jobbers form their warehouses in order to compete a larger operation, and I am just wondering how feasible it is to really believe that if we had a large segment of the market out there, it would remain unserved.

Mr. MacDonald. Well, I do not know that it would remain totally unserved, but it would be unserved because it would be priced out of

the market or could conceivably be priced out of the market.

Let me make an example, if I may.

When I came to this company, somewhat over a decade ago, I can recall some direct delivery customer configuration. As I recall, we had something in the neighborhood of 42,000 outlets that the company was serving.

As I recall, something approximating 8,500 of those outlets were characterized as grocery outlets of some kind. Today, I think the outlets are something less than 35,000 now, maybe even less, with grocery

outlets less than 6,000.

Now, the elimination of those outlets are the changing character of the market. We have vending outlets, for example. There are service station outlets. There are restaurant outlets. There are bar outlets. There are liquor outlets. There are delicatessens, on and on, that do not have the type of distributive availability that soft drinks provides them.

Therefore, if that did not maintain or if there was not an affordability to be serving the total market or have the volume outlet, the

cost on the residual volume would be very sizable, very sizable.

The route averages—it is not too difficult to recognize that if a man makes 30 stops and he has three or four large outlets, to put off a 100 or a 150 cases and he has to serve the other 25 outlets, small drops, that if the tonnage was removed from the top, the balance to serve those outlets would be—would have to carry the remaining cost load.

And, as a consequence, it could very well price them out of the market to where the consumer would not elect to pay that kind of

pricing, whether it be on-premise or otherwise.

There has been in these hearings many times the mention of the returnable container and I think maybe there is not a clear enough understanding what the returnable container means to the franchise system and why the franchise system is essential to be preserved if

returnable containers are to be preserved.

We have just made or are in the process of concluding an investment of a million dollars in the Los Angeles market in the introduction of the 32-ounce container at what might be considered a time in which the packaging changes in the industry have such volatility that one might ask is that a wise thing to do.

Why are we doing it? We are doing it pure and simply because it is a competitive necessity to do it. Our competition have a share of that market, it is growing, there is apparently some resurgence in that market to provide some economy segment that apparently was missing

from the market, and there is considerable response.

Now, we would have to think twice about that kind of an expenditure in the marketplace in which all bottlers could pick those returnable containers up and use them at will when we were getting a deposit that only represented 50 percent of the cost of those containers.

So there really is a very sizable connectability to the returnable container, its maintenance, and I believe it will be in the marketplace for a considerably long time despite the consumer's preference in many

markets for convenience.

But the returnable container may indeed be the last remaining economy package in the soft drink business and could conceivably be there for maybe as long as any of us will be here, and it is essential that franchise boundaries remain.

Mr. Chumbris. Mr. Bangert, will you yield?

Mr. Bangert, Yes.

Mr. Chumbris. We are talking about price now. You are in the operation of producing private brands to the chains; is that correct?

Mr. MacDonald. Yes; we produce cans for them.

Mr. Chumbris. Now, we have had hearings over the years on dual distribution, so you are, in effect, in a dual distribution capacity. You produce your own product that you sell to the public through its outlets and you also—a private brand which also gets to the public.

Now is there a price variation between your brand and the private

brand?

Mr. MacDonald. Yes. Yes; there is. There is. Now, we do not distribute that brand, Mr. Chumbris. We do not. We merely are a contract packer.

Mr. Chumbris. You contract it, it goes through a house, and—— Mr. MacDonald. We just pock it. The chain either picks it up or-

we have nothing to do with the sale.

Mr. Chumbris. But there is a price differentiation between-Mr. MACDONALD. The private label brands and the branded label products. Yes; there is.

Mr. Chumbris. Is that consistent throughout Los Angeles?

Mr. MacDonald. Yes; it is, and it is sizable, and it has had a very strong competitive impact in any market which private label brands exist. And, of course, the private label brand and its pricing, I presume, exists because there is such a thing as a standard brand.

Mr. Chumbris. That is consistent with other products that have come before our committee-Carnation Milk and a private brand, there is always 2 cents price differentiation. That reminded me a little

bit of this.

Mr. MacDonald. Yes; there is.

Mr. Chumbris. Thank you.

Mr. Bangert. What is the spread between private brand and your product?

Mr. MacDonald. It varies considerably at any given time of the marketplace. We find that there are cans of standard brands that come within some reach of the private label's regular price, if there is a regular price for the private label on promotion.

But in any long-range basis, they are under the market, probably

20 or 30 percent.

Mr. Bangert. Well, is not that really another factor with respect to this bill, that if you do not have an exclusive territorial franchise you may restrict your advertising because you are not sure that you are going to get all that business that you spent your advertising money for, and without the advertising and the product differentiation, the private brand, 20 percent difference, whatever it is, may mean more to the consumer if the product cannot really be differentiated through advertising!

Mr. MacDonald. Well, I do not know whether that is the only differentiation of a product, Mr. Bangert. I would hope that there are other quality characteristics to these products other than just the element of

advertising.

But I believe that the advertising which represents, in our company, something-well, maybe in the 4-percent range of sales is, in our judgment, a very effective and very necessary use of promotional dollars in order to give both the pricing opportunity and a brand awareness, so we do not look at it as an inhibiting factor in the competitive marketplace, if I am again understanding the thrust of your question.

Mr. Bangert. Now, as I understand it, postmix is not sold on exclu-

sive territorial basis; is that correct?

Mr. MacDonald. No; it is not.

Mr. BANGERT. Now, do you believe that the small retail outlet suffers and is not served in the postmix area because of the lack of exclusive territorial allocations?

Mr. MacDonald. I would think for most of us and I can speak only for Coca-Cola now because I do not know the mores of other products, that for most of its life, it had not suffered mainly because of the char-

acter of the product.

First, they did not manufacture, they were merely a distributive apparatus. They were sold through the jobbers of all nature whether they be cigar jobbers or candy jobbers, the type of thing in which the

product was used as a loss leader.

And there was not a profit to the distributor but rather the demand of the product was such that he used it in that manner, but as a service for the product came into being, postmix changed in character to where the service characteristic, meaning it is in a 5-gallon container, it requires service characteristics of CO2 gas to move it through the apparatus, it took on different technology necessities and, therefore, started to take on different characterization of distribution.

And that is when the bottler body started to do some distributing in that field, and it was very late in which we entered as a distributor in that field, and we do distribute. And I must say that we distribute through a very select kind of a market because we feel that we again must seek some degree of the pyramid and not serve some of the unprofitable elements.

Mr. Bangert. But other people in the Los Angeles area distribute

postmix other than you, is that right?

Mr. MacDonald. Yes, there are.

Mr. Bangert. So that those customers that you are not serving, pre-

sumably, someone else is serving.

Mr. MacDonald. Yes, we serve it, however, in a little different way in which the characteristic distributors serve. We serve the product by the drink. We put in equipment selling on a finished drink basis by providing him a service and equipment, quite differently than just a gallon of syrup as a distributor. That is our method of distribution.

So there are different types of products at different costs as we look for them. We price the thing we are doing and it is quite different than if jobber "A" just sold a 5-gallon container to customer "B" and he

performed whatever service he did on his own.

Mr. Bangert. But at least in postmix where the retailer has a choice as to whether he buys from you or as to whether he buys from someone else and price may be one of the determinations as to who he is going to buy from in that area, is that right?

Mr. MacDonald. I would presume that is true.

Mr. BANGERT. Do you have-

Mr. MacDonald. We go for the syrup service. We seek the customer who seeks the service. That is the measure of the market, we look to. and we are really not conversant with the other side of the market.

Mr. Bangert. Another question that I have in this area in the possibility of intrabrand competition, it is our understanding that at one time there was a strike of canners for Coke in San Leandro, Calif., and your company was furnishing products to San Leandro, which I understand is about 400 miles away, is that right?

Mr. MacDonald. Yes, I would say that is the approximate mileage. Mr. Bangert. And apparently someone picked up some of that product up there and bootlegged it back into your territory and sold

below your prices in spite of the 800 miles roundtrip.

Mr. MacDonald. I am not familiar with that circumstance. I am familiar with the fact that we may very well have aided in shipping the product on a custom-package basis where they may have asked us to pack some products for them during their interruption but not on any basis of sales, but rather just on a basis of performing a canning function as we might do in an instance of that kind but for any prodnet coming back on that, I am not aware of that circumstance, if it did take place.

Mr. Bangert. Well, tomorrow we are going to have testimony from a gentleman that will tell us about shipping products from—and it was not your product, it was another product—from Denver, I believe, into Los Angeles and, again, selling it below the price of the local

bottler that had the exclusive territory.

Senator Fong. The bell has rung for a vote and I have got to get to the floor to vote, so we will recess this hearing until I get back or Mr. Hart is back.

Thank you, Mr. MacDonald, we are through. Mr. MacDonald. Thank you. Are we concluded? Senator Fong. You are through, yes.

Mr. MacDonald. We are through, right, thank you.

(Whereupon, a brief recess was taken.)

Senator HART. The committee will be in order. First, for the record, I want to thank Senator Fong for interrupting his schedule to help move these hearings, and second, to apologize to Mr. MacDonald. I assure him that I will read the record. I understand that there were some remaining questions for him. Dr. Anderson.

Dr. Anderson. I have just a couple. The—at various points, proponents of the bill have put forward the proposition that it's very important that we have its passage to assure the solution of ecological problems that arise or may arise in relation to the use of soft drinks, and that exclusive territories will protect or maintain or sustain the use

of returnables.

Mr. Smith, earlier this morning, said that the consumer recognizes that returnables are the best buy. In looking at some recent annual reports of your company which, I must say, are outstanding I think in terms of the detail that we can get, in terms of understanding the pattern of your operation and not as good a detail can we get from some of the major franchisors.

In these reports you make some comments on the issue of return-

ables and the consumer. In 1969 you say,

Consumer and dealer interest in convenience packaging are a principal thrust behind conversion to the one-way.

In 1970 you say,

Consumer preference for convenience packaging continues to grow, and trends indicate that more than two-thirds of total volume will be in such containers.

In 1971 you say,

Returnables saw an additional decline in L.A. despite a deposit increase. Oneway bottle and can activity enjoyed a six percent rise, further proof of our consumers choice in favor of a more convenient non-returnable container.

This would seem to suggest—obviously, during this whole period, you've been enjoying the exclusive territory. This would seem to suggest that we cannot count on the exclusive territory as the way in which we are going to solve any ecological problem in this area, wouldn't it?

Mr. MacDonald. Well, Doctor, I don't know, of course, whether soft drinks will solve the ecological problems, because they are a very small part of it. But as it applies to soft drinks, however, I think that those were probably some of the trends that we saw as we wrote those annual reports, and I think that they were reasonably good signs in our opinion in our market.

We think that because the chain configuration in the Los Angeles market is very large, very concentrated as I indicated, and the product goes through that source, and since there is a preference in that segment of the market for one-ways because they don't particularly wish to handle returnable containers, they consider it to be an expense,

something that they could better use, or be without.

But with the ecological overtones from the public and the concerns that have been top of mind for certainly the last few years and getting intensified, the chains, likewise, have been aware that there is a consumer concern regarding ecology, and have elected to even return to some returnable containers on their shelves, which, prior to that awareness, they did not have.

And as I mentioned a little earlier, our investment of some million dollars, give or take, in a new returnable container in the Los Angeles market is giving evidence to the fact that we think that that is a reasonably good investment against the today climate and certainly the returnable is at this point, the most ecological package that we presently have, even though there's technology going on, I'm sure, among the industries of packaging, to improve and come to grips with the ecological overtones of their packaging.

So, I do think it has some relevance.

Dr. Anderson. Do you expect that there are some alternative solutions on the horizon other than maintaining exclusive territories?

Mr. MacDonald. Well, certainly none have been provided to our company that is a replacement for the returnable bottle, either in its ecological overtones or its cost configuration in its reuse.

Dr. Anderson. In 1969, your report said,

No doubt, we will see the development of a new container which facilitates its own disposal.

Have you become more dubious?

Mr. MACDONALD. Well, it isn't a matter of being more dubious, its a matter that I think that dealing with those containers—the container manufacturers spoke, probably, to their hopes sooner than their ability. And they, I think, are hopeful of being able to develop a plastic container or some type of container of that nature that will come to grips with the ecological problems, but I don't think it's on tomorrow's horizon, from what I am able to determine, that is in a demonstrated commercially feasibly form.

Dr. Anderson. OK, one more, if I may. In 1966 in Bottling Industry you had an article called "Advantages of Plant Mergers in

Competitive Market." And at one point you say,

Our concept, and I'm sure that it's not singular, is that for major markets, it won't be too many years in the future before 50, 100, or 150 major market areas in the U.S. will ultimately be the means by which our products go to market.

As these areas influence distribution, we believe it necessary for all bottlers

to get under their respective tents or to form major areas of distribution.

Is that still your view?

Mr. MacDonald. What was the year of that, Doctor?

Dr. Anderson. 1966.

Mr. MacDonald. 1966. Well, probably my rhetoric in 1966 in that speech was greater than my knowledge of the consuming public's desire to move one-way containers or to move to any consolidation. That certainly, heretofore, has taken place.

At the early advent of one-way containers, there were a lot of us who thought that they would accelerate considerably more, and we felt that those situations might maintain, probably faster than they

did, and that was an erroneous conclusion to that extent.

Dr. Anderson. All right. Thank you, Mr. MacDonald. Thank you, Senator.

Senator Hart. Mr. McDonald. again, thank you.

Mr. MacDonald. Thank you, Senator.

Senator HART. Next we welcome the Director of the Bureau of Competition of the Federal Trade Commission, Mr. Alan S. Ward.

Mr. Ward, we are glad you came, and if you will, please identify, for the record, those who came with you.

# STATEMENT OF ALAN S. WARD, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. WARD. Thank you, Mr. Chairman.

The gentlemen with me are Ernest Barnes, an assistant director of the Bureau of Competition of the Federal Trade Commission, Mr. David Wilson, an attorney on the staff of the Bureau of Competition, and Mr. Stephen Nelson, an economist of the Bureau of Economies of the Federal Trade Commission.

It is a privilege for me to appear before this committee, this morning—to comment on and respond to questions about the proposed leg-

islation, which is the subject of these hearings.

I am not going to read the entire statement that I have submitted, this morning.

Senator HART. It will be admitted in full.

Mr. WARD. I will cover parts of it.

(The document follows. Testimony resumes on p. 226.)

STATEMENT OF ALAN S. WARD, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION, IN OPPOSITION TO ENACTMENT OF S. 3040, 3116, 3133, 3145, AND 3587, BEFORE THE SUBCOMMITTEE ON ANTIRUST AND MONOPOLY, COMMITTEE ON THE JUDICIARY, U.S. SENATE, AUGUST 9, 1972

It is a privilege for me to appear before this distinguished Committee to comment on and respond to questions about the proposed legislation which is the subject of these hearings. In essence, these bills—S. 3040, 3116, 3133, 3145 and 3587—seek to provide that, under certain circumstances, exclusive territorial arrangements under which sellers of trademarked food products may not compete outside a geographically limited area shall be deemed not lawful.

In my opinion, passage of legislation of this nature would be contrary to the public interest. Legislation sanction for the elimination of significant competition will (1) increase the cost to consumers of trademarked food products. (2) prevent business enterprises affected by the bills from taking advantage of operational efficiencies and economies, and (3) permit the destruction of those small businesses whose assigned territories are too small to support minimally profitable operations. The principal beneficiaries of the proposed legislation will be the already large and profitable corporate enterprises, many of which now avoid competition because of territorially limited sales areas and charge higher than competitive prices within their protected markets.

In sum, these bills are at odds with both the antitrust laws and with sound public policy. How much this kind of legislation may cost consumers is difficult to precisely estimate, but it would certainly be many hundred-millions of dollars. We estimate territorial limitations in the five billion dollar soft drink market may cost consumers as much as \$250 million each year. Since these bills would legalize territorial restrictions not only in the five billion dollar soft drink industry, but in the entire \$131 billion food industry, the potential adverse effect on

the consuming public could be truly enormous.

My comments today, as the Committee knows, are my personal views only and do not constitute an official statement of the Federal Trade Commission, or any of its members. The Commission has neither reviewed nor endorsed my statement.

I do, however, have with me a letter from the Federal Trade Commission directed to Senator Eastland as Chairman of the Committee on the Judiciary which sets forth the views of the Commission in opposition to this proposed legislation. In its letter, the Commission sets forth its reasons for strongly opposing enactment of this type of legislation. The Commission letter also states that, because several antitrust enforcement matters now before it specifically pertain to the business arrangements which are the subject of this legislation, the Commission desires to comment only generally on these bills. Copies of both the Commission's letter and my statement have been sent to the Office of Management and Budget, but there has been no clearance or approval by OMB of either.

I am also submitting copies of a staff statement opposing enactment of these bills. This statement was sent several months ago to Senator Eastland, Chairman

<sup>&</sup>lt;sup>1</sup> Statement in opposition to S. 3040, H.R. 12261, and identical bills, legislation which would legalize territorial restrictions in the soft drink industry. Bureau of Competition and Bureau of Economics, Federal Trade Commission, March 31, 1972.

of the Senate Committee on the Judiciary; Congressman Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, and to many other senators and congressmen who have contacted the Commission's staff about these bills and about the Commission's eight pending adjudicative cases challenging territorial restrictions in the soft drink industry.

I want to emphasize that the staff's statement was prepared in response to questions raised in several hundred communications from Congress. It deals specifically with many matters which relate to this proposed legislation, including issues which in some form or other may have been raised in connection with

the Commission's pending cases.

The appropriate forum for dealing with the merits of these cases, of course, is the Commission's adjudicative procedures. I repeat our earlier recommendation that legislation be deferred until those cases have been decided, particularly since I believe a final Commission order will completely refute a prime argument for this legislation, that is, that without territorial protection, many small bottlers will be forced out of business by their more powerful and efficient neighbors. The Commission's staff will urge an order in each of the pending cases which will free small bottlers from territorial restrictions, but will neutralize for a period of years the ability of syrup manufacturers and dominant multi-plant bottlers to destroy those small companies which may be initially unable to compete with the large bottlers.

In a memorandum recently filed by the staff in the adjudicative cases, we have suggested protective measures which will enable small bottlers to become competitive with large bottlers. A copy of that memorandum has been filed with the Committee. Recently, the Supreme Court in Ford Motor Co. v. United States— U.S.—(1972), indicated its approval of relief designed to nurture the forces of competition so as to rectify the effects of Ford's antitrust violations. Similarly, small bottlers must be nurtured so that the effects of the illegal territorial restrictions can be eradicated. And, I repeat, such an order, if we win the cases, and if entered by the Commission, would obviate the necessity for any legislation to

protect small bottlers.

As I noted earlier in my statement, these bills are designed to have a broad market impact considerably beyond the soft drink industry. Yet, it would be disingenuous to discuss their implications without response to that industry. These bills seek to make legal precisely that which the proceedings now before the Commission seek to declare unlawful under the antitrust laws. Moreover, the major effort to justify enactment of these bills appears to have come from the soft drink industry. While I do not intend even to comment on the lawfulness of the particular territory limitation at issue in the eight pending cases. I can, without discussing the merits of that litigation, deal with the basic arguments made by the soft drink industry in support of these bills.

It is urged that small bottlers will be the principal beneficiary of this proposed legislation. In fact, the major beneficiary of these bills will be large multi-plant bottlers, including the syrup makers and a few major conglomerate corporations. A related argument is that the present territorially-limited system preservesand is essential to preserve-small bottlers. In fact, under the present system of territorial restrictions, small bottlers are going out of business at an ever-

increasing rate.

### NATURE OF CORPORATE PARTICIPANTS IN SOFT DRINK BOTTLING

An examination of the type of corporations engaged in soft drink bottling reveals that small and medium-sized, single-plant bottlers are becoming increasingly less significant factors in this business. Many plants are still small and locally owned; however, the importance of such bottlers is vastly overstated by a mere examination of the number of plants they operate. Small bottlers account for a small and decreasing share of soft drink sales, the relevant measure of industry concentration. With the decreasing importance of small bottlers, three types of firms have come to dominate soft drink bottling:

1. Wholly-owned bottling and canning operations of the syrup manufacturers:

2. Bottling plants owned by large conglomerate corporations; and

3. Large, multiplant bottling companies. Firms of these three types accounted for 62.5% of total industry sales in 1967, the last year for which data are available. The 1972 Census will undoubtedly show a much higher percentage of the market dominated by these large companies in view of the significant number of mergers and acquisitions in the industry since 1967. Since 1958, when relevant data first became available, the percentage of total industry sales accounted for by all multiplant bottlers has steadily increased from 43.3%, in 1958, to 50.9% in 1963, and, most recently,

to 62.5% in 1967.

Annual surveys by an industry trade journal, Soft Drinks, document the rapidly increasing importance of large bottling plants, and the even more rapidly declining importance of small and medium-sized plants. The number of soft drink bottling plants dropped from 3,501 in November 1968, to 2,990 in November 1971. During this time, the percentage of total soft drink sales accounted for by plants with an annual sales volume of over \$2 million increased from 54% to 69%, while the percentage of total soft drink sales accounted for by plants with annual sales volume of \$500,000 or less fell from 16% to 10%.

#### THE BOTTLING OPERATIONS OF SYRUP MANUFACTURERS

Seven of the eight largest syrup manufacturers have large bottling facilities located in major markets. The Coca-Cola Company owns and operates bottling facilities serving such major U.S. cities as Chicago, San Francisco, Seattle, Oakland, San Jose, Baltimore and Boston. Twenty-eight million people reside in areas of the country in which Coca-Cola brands are bottled exclusively by the Coca-Cola Company. Similarly, the second largest supplier of soft drink syrup. PepsiCo, Inc., operates bottling facilities in such areas as New York City, Boston, Milwaukee, and the entire State of Michigan. Forty-one million people live in areas of the country in which Pepsi-Cola brands are bottled exclusively by PepsiCo.

#### THE CONGLOMERATE BOTTLERS

By virtue of acquisitions, several conglomerates are among the largest bottlers in the country: Westinghouse Electric Corp., Beatrice Food Co., Illinois Central Industries, Inc., General Tire and Rubber Co., Borden, Inc., Wometoe Enterprises, Inc., General Cinema, and Rheingold. As to Westinghouse in particular, it enjoys an exclusive territory for all Seven-Up soft drink products in an area of the country which comprises 7.9% of total U.S. population, or 15.9 million consumers, and which covers all of Southern California and most of Indiana.

Besides this "exclusive" as to 16 million citizens, Westinghouse also has exclusive territories in Connecticut and Puerto Rico.

### THE LARGE, MULTIPLANT BOTTLING ENTERPRISES

The soft drink companies serving the greatest portion of the United States population are large firms located in metropolitan areas, devoted primarily to bottling, and generally operating more than one bottling plant. Among such large multiplant bottlers are the Coca-Cola Bottling Company of New York, the Coca-Cola Bottling Company of Los Angeles and Allegheny Beverage Corp. Most of these firms have achieved their present market position by virtue of acquisitions.

## HIGH CONCENTRATION LEVELS EXIST IN BOTTLING AND MERGER ACTIVITY IS SIGNIFICANT

Because such large firms engage in soft drink bottling, high concentration levels exist in this industry. The 24 largest Coca-Cola bottlers serve nearly 61% of the United States population and account for approximately 24% of total soft drink sales. The 10 largest Pepsi bottlers serve 48% of the population and account for almost 8% of total soft drink sales. The 12 largest Seven-Up franchisees, two of which are also two of the top 10 Pepsi franchisees, serve 41% of the population. Approximately 40 bottlers account for more than one-third of total soft drink sales.

However, the relevant measure of concentration in the soft drink industry is the concentration in local markets. Local markets, not national markets, are the locus of competition in soft drink bottling as territorial restrictions confine bottlers to competing in local markets. To put it simply, bottlers compete on the local level, not on the national level, and concentration of sales among local bottlers is quite high. According to the Bureau of Census, in 1963, the four largest bottlers in nine large metropolitan areas had, on the average, 68% of the market. This high concentration level among bottlers at the local level parallels the high

concentration level of the four largest syrup manufacturers who share about 70% of the national market. Thus, a similar concentration level would naturally exist at the local level since bottlers sales reflect, to a great extent, the market shares of

the brands they sell.

One reason for the high local concentration among bottlers is the extent to which bottlers produce products of several syrup manufacturers. For example, in New York City, both Coca-Cola and Dr. Pepper products are marketed by Coca-Cola Bottling Co. of New York. Certainly, there can be no real competition between these brands bottled by a common bottler as a firm is not going to engage in price competition with itself. In 1970, of the 1,654 bottlers of products of the eight largest syrup manufacturers, 738 bottled products of more than one such manufacturer. Because of the large number of bottlers who bottle more than one brand, effective competition between different brands does not exist.

The high concentration among bottlers in local markets is reflected by the ease at which they have been able to increase prices in recent years. In this regard, it should be noted that, for the period 1959–1970, Bureau of Labor Statistics data indicates the wholesale price of cola soft drinks, which account for about 60% of the soft drink industry, has increased by 65%. Similarly, the Consumer Price Index records a 64% price increase in cola soft drink prices. This 64% rise in cola soft drink prices on the Consumer Price Index is a much faster price rise than

the 33% price rise for all food prices during the period 1959-1970.

A BLS data measures change in price on the same container size, that is, the price of a 6 bottle carton of 12 oz. bottles, in 1960, as compared to the same size carton in 1970. This is a statistically valid measure of price increases. The apples and oranges approach used by NSDA of comparing different container sizes and different container types is obviously statistically invalid.

# LOWER SOFT DRINK PRICES FOR CONSUMERS WILL RESULT FROM THE ELIMINATION OF TERRITORIAL RESTRICTIONS

Bottlers can economically serve much larger geographic markets than the artificial territories their bottler contracts limit them to serving. Within these larger market areas, neighboring bottlers sell the same brand of soft drink at prices which may vary by as much as 30%. If territorial restrictions are removed, food wholesalers and retailers would be free to shop around to purchase soft drinks from the bottler of a particular brand who offered the lowest price and/or best service. As a consequence, soft drink prices in the market area would gravitate toward the lower prices and service would be improved. Competition at the distribution level would insure the food wholesalers and retailers would seek purchases from the lowest-priced bottler and pass on much of the savings to consumers.

One available method of distribution for soft drinks is central warehouse delivery by food retailer co-operatives, food wholesalers and food chains. This is the method of distribution used for the prependerance of the processed food products sold in food stores. All we advocate is that retailers, wholesalers and bottlers be permitted to decide which distribution system they prefer rather than having that decision made for them by the syrup manufacturers. To the extent that central warehousing offers any cost advantages, it benefits small and large bottlers and small and large retailers alike.

Soft drink prices now differ by as much as 30% within the same trade area. At wholesale, soft drink sales accounted for 5% of the nation's food budget, and in 1971, exceeded \$5 billion. Thus, for each percentage point the average price of soft drinks falls, consumers will save \$50 million per year on the same quantity of soft drinks purchased. If the average price falls as much as 5%, which is not unrealistic, consumers savings could reach \$250 million per year.

# THE DEMISE OF SMALL BOTTLERS IS ENCOURAGED BY LEGISLATION THAT WILL PERPETUATE TERRITORIAL RESTRICTIONS

Predictions of doom for small bottlers without territorial protection are at least questionable if one considers only successful small business operations in other industries which do not have such restrictions. The assumption that territorial protection preserves small businesses has no more validity for the soft drink industry than it does for any other businesses. That territorial restrictions have not helped smaller bottlers is apparent from the rapid decline of these bottlers in recent years. From about 5,200 firms, in 1947, the number of bottling companies has declined to 2,300 in 1970, and only 1600 of these bottle one or more of the eight major brands. This steady and accelerating decline in the number of

small bottlers, in recent years, the loss of market share to private brand bottlers, and other similar developments well illustrate the present vulnerability of those

small bottlers whose territories limit their competitive capabilities.

Survival or success under the present territorially-limited system, thus, may not depend on a bottler's industry, judgment, or skill, the economies of his operations or the quality of his service, as much as it does on the boundaries of his territory. Proscribing competitive opportunities for growth cannot really protect the inefficient, even if that was desirable; such restrictions do limit the competitiveness of the efficient large and small bottlers, and that certainly is undesirable.

Many small bottlers today serve territories so limited that they cannot even have one bottling line of minimum efficient size that operates five days per week. Such bottlers have rapidly been existing from the market, usually selling their franchises to nearby large bottlers, which simply liquidate the acquired plants

and serve the additional market from their existing plants.

Small bottlers have the ability to serve much wider areas than those to which they are currently restricted. This is due to the great changes in transportation and distribution systems which have taken place since the territorial boundaries were established. A 1965 study by the National Soft Drink Association stated:

"Many of today's franchise boundaries, while well-suited to earlier modes of transportation have become too small to allow individual bottlers to capitalize

on established retail trading areas.'

Coca-Cola has recognized this and has instituted a plan to encourage the consolidation of its current hundreds of bottlers. This plan, administered by its Bottler Consolidation Department, has resulted in a large number of mergers and acquisitions among the Coca-Cola bottlers in recent years. Because of this Coke plan of consolidation, there may be no small bottlers left to protect. Thus, the ultimate effect of this proposed legislation will be to protect the territories of the Coca-Cola Company and the handful of its remaining gigantic bottlers.

In summary, territorial restrictions in the soft drink industry have actually contributed to the decline in the number of bottlers. Small bottlers have been denied the opportunity of expanding their sales and growing to efficient size, and, thereby, to continue to do business in this industry. Consequently, they have been induced to leave the industry. If the territorial restrictions are removed, small bottlers will be given an opportunity to expand their operations to the point at which they can support an efficient plant. Mergers among small bottlers would not violate the antitrust laws, nor would the establishment of joint production facilities by small bottlers. Enactment of the proposed legislation may aid small bottlers seeking to sell their businesses to large bottlers; however, it will adversely affect those small businessmen who desire to continue to compete in the bottling business.

#### SMALL CUSTOMERS WILL NOT BE DISADVANTAGED

Ending territorial restrictions will neither cause the end of service to small customers nor force them to pay higher prices. Many small soft drink buyers currently purchase other food products from wholesalers who operate warehouses. Such wholesalers will provide soft drinks to small stores along with other food products. Indeed, it may be cheaper for these small stores to depend on one source for all their food product needs rather than having to split their business as currently must be done. For instance, small grocers, bars and drug stores in Los Angeles currently are buying soft drinks through a co-operative at lower prices than they can buy them direct from the bottler's trucks.

Another source for small customers are vending companies who already are supplying customers with items such as candy. In other words, small purchasers will be serviced with soft drinks as efficiently as at present, and perhaps more so, if the industry is freed of territorial restrictions which presently prevent

innovations in distribution methods.

### EFFECT ON ECOLOGY

The end of territorial restrictions will not have the drastic effect on ecology predicted by some bottlers. First, more and more consumers are demanding nonreusable containers and this trend would be expected to continue regardless of whether territorial restrictions are eliminated or maintained. Second, chain grocers handle the products demanded by consumers and handle returnables if consumers wish these products. Indeed, one of the largest chains even bottles

private label soft drinks in returnable bottles. Third, a total shift to nonreturnables may have no effect on the environment as waste disposal and recycling plants are being established to handle the wide range of cans and bottles left from the sale of many food items. Thus, the effects of territorial restrictions on returnable or nonreturnable usage, will be secondary to other ecology solutions and consumer desires or needs.

### PROPOSED RELIEF IN THE COMMISSION'S TERRITORIAL RESTRICTION CASES

Proponents of the proposed legislation assert that this legislation is the only way to preserve small bottlers and prevent the takeover of the industry by syrup companies and a few large bottlers. This fails to take cognizance of the Commission's ability to fashion relief in its adjudicative proceedings. Our proposed relief will insure that many more small bottlers will survive than if territorial restrictions are legalized and consolidations of small bottlers continue. Furthermore, our proposal would create the maximum competition among surviving bottlers and prevent further vertical integration by the syrup companies.

Small bottlers must be afforded the opportunity to grow to a size at which they can realize the necessary economies of scale to enable them to compete effectively with large bottlers. To insure that small bottlers are given this opportunity, the staff has proposed that large bottlers be prohibited from selling into territories of small bottlers. However, small bottlers would be permitted to sell into the profitable territories now served exclusively by large bottlers. Thus, small bottlers will be given the opportunity to become viable competitors, something they cannot achieve under the existing system of territorial restrictions, a system which would be perpetuated by this proposed legislation.

The Commission's proceedings do not, of course, challenge the lawfulness of a syrup manufacturer restricting a bottler to a particular manufacturing location, or the right of a syrup manufacturer to select its bottlers. The economic advantage of a bottler being the sole producer of a particular brand located in a designated area will remain. Thus, an acquirer of a bottling franchise would

not have the right to bottle its brands anywhere in the United States.

#### CONCLUSION

The proposed legislation represents an unjustified attempt to carve out a special exemption to the antitrust laws for the food processing industry, particularly the soft drink industry. These bills will not save small bottlers, but, instead, will perpetuate and further entrench the domination of large bottlers and conglomerates. Enactment will cause consumers to continue to pay higher than competitive prices for soft drink products. Prices will also rise in the entire \$131 billion food manufacturing industry. Passage of this proposed legislation will increase the demand of other industries for exemption from the antitrust laws when their illegal practices are challenged. This legislation is not in the public interest. I urge this Committee to reject these bills.

Mr. WARD. To begin with, I would like to summarize my judgment of the legislation which is proposed to authorize exclusive territorial arrangements so that a seller of trademarked food products may not

compete outside a geographically limited area.

In my opinion, passage of legislation of this nature would be contrary to the public interest. Legislative approval would involve the elimination of significant competition and would tend to increase the cost to consumers of trademarked food products, would prevent business enterprises affected by the bills from taking advantage of operational efficiencies and economies, and would permit the destruction of those small businesses whose assigned territories are too small to support minimally profitable operations.

The principal beneficiaries of the proposed legislation will be already large and profitable corporations, many of which now avoid competition because of territorially limited sales areas, and charge

higher than competitive prices within protected markets.

In sum, these bills are at odds with both antitrust law and with sound public policy. How much this kind of legislation may cost consumers is difficult to precisely estimate, but it would certainly be many hundred millions of dollars.

We estimate territorial limitations in the \$5 billion soft drink mar-

ket may cost consumers as much as \$250 million each year.

Since these bills would legalize territorial restrictions, not only in the \$5 billion soft drink industry, but in the entire \$131 billion food industry, the potential adverse effect on the consuming public could

be truly enormous.

I think, from the testimony that I am aware of by prior witnesses, this point is not really argued. This type of legislation will permit higher prices to continue, or will allow higher prices to be charged. How much the overcharge will amount to is probably subject to some different viewpoints.

But the argument has been made that doing away with territorial limitations will permit only initially lower prices and then there will be a higher price charged after that. This seems to me runs contrary to our experience in every other industry where territorial limitations

have been done away with.

I want to emphasize, as you know, Mr. Chairman, the views that I am expressing this morning are my personal views only, and do not represent an official statement of the Federal Trade Commission or any of the Federal Trade Commissioners.

The Commission has neither reviewed nor endorsed the statement

that I will make this morning.

I do have a letter with me from the Federal Trade Commission, directed to Senator Eastland as chairman of the Committee on the Judiciary, which sets forth the views of the Commission in opposition to this proposed legislation. I already have delivered that to the staff.

In its letter, the Commission sets forth its reasons for strongly opposing the bills, and also states that because several antitrust enforcement matters are now before it which specifically pertain to these business arrangements, the Commission desires to comment only

generally on these bills.

I also have submitted a staff statement opposing enactment, which was earlier sent to Senator Eastland and to Congressman Staggers, and many other congressmen and Senators. I want to emphasize that the staff statement was prepared in response to questions raised in several hundred communications from Congress. It deals, specifically, with many matters which relate to the proposed legislation, including issues which, in some form or other, may have been raised in connection with the Commission's pending cases.

The appropriate forum for dealing with the merits of those cases have been decided, particularly since I believe a final Commission order will completely refute a prime argument for this legislation, that is, that without territorial protection, many small bottlers will be forced out of business by their more powerful and efficient neighbors.

The Commission's staff will urge an order in each of the pending cases, which will free small bottlers from territorial restrictions, but will neutralize, for a period of years, the ability of sirup manufacturers and dominant multiplant bottlers to destroy those small companies which may be initially unable to compete with the large bottlers.

Such an order, if we win the cases, and if entered by the Commission, would obviate the necessity for any legislation to protect small

bottlers.

As I noted earlier in my statement, these bills are designed to have a broad market impact considerably beyond the soft drink industry. Yet, it would be disingenuous to discuss the implications of the legislation without reference to that industry. The bills seek to make legal precisely that which the proceedings now before the Commission seek to declare unlawful under the antitrust laws. Moreover, the major effort to justify enactment of these bills appears to have come from the soft drink industry. While I will not, this morning, comment on the lawfulness of the particular territorial limitations at issue in the eight pending cases, I can, without getting into the merits of that litigation, deal with the basic arguments made by the soft drink industry in support of these bills.

It is urged that small bottlers will be the principal beneficiaries of this proposed legislation. In fact, the major beneficiaries of these bills will be large multiplant bottlers, including the sirup makers and a

few major conglomerate corporations.

 $\Lambda$  related argument is that the present territorially limited system preserves, and is essential to preserve, small bottlers. In fact, under the present system of territorial restrictions, small bottlers are going

out of business at an ever-increasing rate.

My statement shows the type of corporations engaged in soft drink bottling which are becoming increasingly dominant. They are the wholly owned bottling and canning operations of the sirup manufacturers, bottling plants owned by large conglomerate corporations, and large, multiplant bottling companies. The significance of the small bottler in this industry is rapidly declining.

The statement points out that the percentage of the market con trolled by multiplant bottlers has increased considerably from 43.3 percent in 1958, to over 50 percent in 1963, and to 62.5 percent in 1967, and it is, undoubtedly, much larger now. The 1967 figure is the

latest available Bureau of Census figure.

And I also identify in my full statement some of the largest bottlers in the United States: the Coca-Cola Co., itself, Pepsico, Inc., Westinghouse Electric Corp., Beatrice Foods Co., Illinois Central Industries, Inc., General Tire & Rubber Co., General Cinema Corp., Borden, Inc., Wometco Enterprises. Inc., and the large multiplant operators that are the individual bottlers, many of which bottle more than one of

the major brands, and other brands as well.

On a nationwide level, there are high concentration levels in the soft drink industry, but as outlined in my statement, the relevant measure of concentration in the soft drink industry is the concentration in local markets. Local markets, not national markets, are the focus of competition in soft drink bottling, and this is, in large part, because territorial restrictions confine bottlers to competing in local markets. To put it simply, bottlers compete on the local level, not on the national level, and concentration of sales among local bottlers is quite high. According to the Bureau of Census, in 1963, the four largest bottlers in nine large metropolitan areas had, on the average, 68 percent of the market. This high concentration level among bottlers at the local level parallels the high concentration level of the

four largest sirup manufacturers who share about 70 percent of the national market. Thus, a similar concentration level would naturally exist at the local level, since bottlers' sales reflect, to a great extent. the

market shares of the brands they sell.

One reason for the high local concentration among bottlers is the extent to which bottlers produce products of several sirup manufacturers. For example, in New York City, both Coca-Cola and Dr Pepper products are marketed by the Coca-Cola Bottling Co., of New York. Certainly, there can be no real competition between these brands, bottled by a common bottler, as a firm is not going to engage in price competition with itself.

In 1970, of the 1,654 bottlers of products of the eight largest syrup manufacturers, 738 bottled products of more than one such manufacturer. Because of the large number of bottlers who bottle more than one brand, effective competition between different brands in many markets

simply does not exist.

The high concentration among bottlers in local markets is reflected by the ease by which they have been able to increase prices in recent years. In this regard, it should be noted that, for the period 1959-70, Bureau of Labor Statistics data indicates the wholesale price of cola soft drinks has increased by 65 percent. Similarly, the Consumer Price Index records a 64-percent price increase in cola soft drink prices. This 64-percent rise in cola soft drink prices, on the Consumer Price Index, is a much faster price rise than the 33-percent rise for all food prices during the period 1959-70.

I think the testimony that has been given before the committee, and notably this morning, indicates that bottlers can and, perhaps, even must, economically serve much larger geographic markets than the artificial territories their bottler contracts limit them to serving.

Within larger market areas, neighboring bottlers sell the same brand of soft drink at prices which may vary by as much as 30 percent. If territorial restrictions are removed, food wholesalers and retailers would be free to shop around to purchase soft drinks from the bottler of a particular brand who offered the lowest price or the best service.

As a consequence, soft drink prices in the market area would gravitate toward the lower prices and service would be improved. Competition at the distribution level would insure that food wholesalers and retailers would seek purchases from the lowest-priced bottler and could pass on much of the savings to the consumer.

One available method of distribution for soft drinks is central warehouse delivery by food retailer cooperatives, food wholesalers, and food chains. But that is only one of the distribution methods which could be taken advantage of if the territorial restrictions were removed. To the extent that central warehousing offers any cost advantages, it benefits small and large bottlers and small and large retailers alike.

I want to turn to the other basic argument in favor of this legislation, that small bottlers are doomed if they don't have the protection

of territorial restrictions.

Predictions of doom for small bottlers without territorial protection are, at least, questionable if one considers only successful small business operations in other industries which do not have such restrictions. The assumption that territorial protection preserves small businesses has no more validity for the sofe drinks industry than it does

for the other business.

That territorial restrictions have not helped small bottlers is apparent from the rapid decline of these bottlers in recent years. From about 5,200 firms in 1947, the number of bottling companies has declined to 2,300 in 1970, and only 1,600 of these bottle one or more of the eight major brands. This steady and accelerating decline in the number of small bottlers, in recent years, the loss of market share to private brand bottlers, and other similar developments, well illustrate the present vulnerability of those small bottlers whose territories limit their competitive capabilities.

Survival or success under the present system, thus, may not depend on a bottler's industry, judgment, or skill, the economies of his operation or the quality of his service, as much as it does on the boundaries of his territory. Proscribing competitive opportunities for growth cannot really protect the inefficient, even if that were desirable. Such restrictions do limit the competitiveness of the efficient large and small

bottlers, and that certainly is undesirable.

Many small bottlers today serve territories so limited that they cannot even have one bottling line of minimum efficient size that operates five days a week. Such bottlers have rapidly been exiting from the market, usually selling franchises to nearby large bottlers, which simply liquidate the acquired plants and serve the additional market from their existing plants.

In summary, territorial restrictions in the soft drink industry have

actually contributed to the decline in the number of bottlers.

Small bottlers have been denied the opportunity of expanding their sales and growing to efficient size, and, thereby, to continue to do business in this industry. Consequently, they have been induced to leave the industry.

If territorial restrictions are removed, small bottlers will be given an opportunity to expand their operations to the point at which they

can support an efficient plant.

Mergers among small bottlers would not violate the antitrust laws, nor would the establishment of joint production facilities by small bottlers.

Enactment of the proposed legislation may aid small bottlers seeking to sell their businesses, but it will adversely affect small businessmen who desire to continue to compete in the bottling business.

Some proponents of the proposed legislation assert that this legislation is the only way to preserve small bottlers and prevent the takeover of the industry by syrup companies and a few large bottlers.

This argument fails to recognize the Commission's ability to fashion relief in its adjudicative proceedings. Our proposed relief will insure that many more small bottlers will survive than if territorial restrictions are legalized and consolidations of small bottlers continue.

Furthermore, our proposal would create the maximum competition among surviving bottlers and prevent further vertical integration by

the syrup companies.

Small bottlers must be afforded the opportunity to grow to a size at which they can realize necessary economies of scale to enable them to compete effectively with large bottlers. To insure that small bottlers are given this opportunity, the staff has proposed that large

bottlers be prohibited from selling into territories of small bottlers. However, small bottlers would be permitted to sell into the profitable

territories now served exclusively by the larger companies.

Thus, small bottlers will be given the opportunity to become viaable competitors, something they cannot achieve under the existing system of territorial restrictions, which would be perpetuated by the proposed legislation.

In conclusion, in my opinion, the proposed legislation represents an unjustified attempt to carve out a special exemption to the antitrust laws for the food processing industry, particularly the soft drink

industry.

These bills will not save small bottlers, but, instead, will perpetuate and further entrench the domination of large companies. Enactment will also cause consumers to continue to pay higher than competitive prices for soft drink products. Prices may also rise in the much larger food manufacturing industry.

Passage of the proposed legislation will increase the demand of other industries for exemption from the antitrust laws when their

illegal practices are challenged.

This legislation is not in the public interest, and I urge this committee to reject these bills.

Senator Hart. Thank you, Mr. Ward.

Before our staff have a chance to develop concerns they have about the bill, let me ask you whether you were familiar with the testimony that was received, yesterday, from a witness who had, I guess, a letter that was addressed to the Senator from New York, Senator Buckley? It was a letter, I understand, signed by you, and apparently Senator Buckley had forwarded it to the Commission.

You wrote to the Senator and suggested that, on this question of territorial restrictions, that bottlers would have an opportunity to

respond, or present their case to the Commission.

The witness felt that this commitment, if such it is, had not been delivered on.

Are you familiar with that?

Mr. Ward. I am not sure that I have the precise letter that was referred to yesterday. I do have a letter to Senator Buckley that I wrote to him on April 9, 1971, and there is a statement in that letter which indicates that the Commission's action, in filing the complaints, did not imply adjudication of the matter as charged, and the soft drink companies are entitled to a full trial on their merits, if they so elect.

That was my judgment in 1971, and I can't tell the committee, this

morning, exactly what the trial will involve, at this point.

We have moved for a summary judgment. In our opinion, developments in the law since this letter was written, notably a decision by the Supreme Court of the United States, in the *Topco* case, indicated that we should move for a summary judgment.

I might also say, the Supreme Court's decision in the S and H case made us feel that it was our obligation to try to move the litigation

to a conclusion as rapidly as possible.

Now, that motion has not been granted. I would hope, of course, that the hearing examiner will grant it, and I think we have a reasonable argument in favor of it. I think that the opportunity will certainly

be afforded in that adjudicative hearing, for the soft drink companies to make perfectly obvious to the hearing examiner and to build the record as to what their full defense on the merits amounts to.

At this point, I would not predict what the result of that motion

will be.

Senator Hart. Your answer may stand as you have given it. But the date of the letter that was submitted to us, from you to Senator Buckley, was June 7 of 1971.

Mr. WARD. We searched for that letter, and perhaps we are going

to find it, but we have not found it, yet.

Mr. Chumbris. Maybe that is because we have it.

Senator HART. Why don't you take a copy, which we have, review it, and, then, for the record, respond to that question, having the letter in front of you?

Mr. WARD. I will be glad to. (See p. 238.)

Senator Hart. Mr. Bangert?

Mr. Bangert. Mr. Ward, last week, as you indicated, you did move for a summary judgment and there was a proposed remedy, as I understand it, that was incorporated in that summary judgment motion.

And we have had some discussion during the last 2 days on it, and I have attempted to describe, as best I could, what I think it is.

But I wonder if you could, just briefly, tell us what that proposed

remedy would constitute?

Mr. WARD. Well, we have made a suggestion that a full factual hearing be held on the relief which should be entered if our motion for summary judgment were to be granted. We have suggested that the hearing on relief determine how this existing territorially restricted system should be made competitive.

And I think, although there have been a great many statements about the potential impact of any relief, there needs to be a factual record to support the allegations that have been made about it, that it is going to drive these companies out of business, that it is going to

permit monopolies to take over the soft drink industry.

We think those sorts of allegations should be tested on the basis of

a factual record.

Now, our proposal, at this point in time, before that factual record has been developed, in general would provide that for 10 years large bottlers would be prohibited from selling into the territories of small bottlers, but that the territorial restrictions would be completely removed from the smaller companies. Franchise companies, that is the large sirup manufacturers, would be prohibited from vertical integration

In our view, the ending of territorial restrictions, and at the same time providing temporary measures that would protect the interest of the smaller companies, which do not have the efficient basis for operation, will insure that many more small bottlers will survive than if

territorial restrictions continue.

Now, at the end of a hearing on relief, there may also be other relief that would be determined to be appropriate. Indeed, some of the factors that bear on the appropriate relief may not even be obvious to us now. And we would think that the Supreme Court's decision in the Ford case, this term, approves this type of procedure to determine

what appropriate relief would be. It would also approve the restriction on companies who are in the favored protected position by reason of the

long-established territorial restrictions.

Mr. Bangert. There has been, at least, a mild criticism for years that the antitrust agencies have not been relief or remedy oriented, that they filed cases and that their relief that eventually comes out is less than adequate; and I guess that, in this instance, you believe that you will concentrate on that relief and assure that the relief, if you win the case, is the type of relief that will protect competition and the small bottler. Is that right?

Mr. WARD. Yes.

Actually, the relief problems in these cases are the ones that really have occasioned most of the comment, most of the controversy, and we have certainly given a great deal of consideration, from the very beginning of the investigations and the commencement of litigation, to the problems that relief in these cases will involve.

Mr. Bangert. And, at that time, as you indicate, small bottlers and presumably several other people, will have an opportunity to come in, in a full blown hearing, and present their ideas with respect to relief.

Mr. WARD. Yes.

Mr. Bangert. You described local concentration, in your statement, and I am wondering if you can, perhaps in greater detail, give us a little greater detail with respect to, particularly, how this concentration is in metropolitan areas?

Mr. WARD. Well, our data at this time, is certainly not completely up-to-date. The figures that I cited in my statement were for, I think, nine census areas, and in those, the four largest bottlers in those markets had on the average about 70 percent of the market in 1963.

I would anticipate that that figure would be a little bit higher today. An example of the concentration of a local market, I would think, would involve the market which was testified about this morning by Los Angeles Coke.

In that market, L.A. Coke distributes Coca-Cola and Canada Dry products, as well as being a contract bottler, as the witness testified.

Rheingold Corp., distributes Pepsi-Cola products. The 7-Up bottler is Westinghouse, and Royal Crown products are distributed by Beatrice Foods.

Those are the large corporations that dominate that metropolitan market, and benefit from the territorial restrictions on competition, which keep other companies selling their branded products from competing in that market.

Mr. Bangert. Now, as I understand it, the case that the Federal Trade Commission brought, did not affect either all sirup manufacturers nor all bottlers, but I think seven—is that right, seven of the-

Mr. Ward. Eight. There are other respondents in those cases.

Mr. Bangert. Several large bottlers, in addition to the sirup manufacturers, and several other bottlers, have intervened, and, I believe. an association.

Mr. WARD. There have been no large bottlers that have intervened, but the Coca-Cola and Pepsi-Cola Bottler Associations have as well

as approximately 15 smaller bottlers.

Mr. Bangert. What did you use as your basis for deciding to bring this suit against this group, but leave out other sirup manufacturers and bottlers?

Mr. Ward. Well, that's a fairly involved question. I would not pretend to answer it entirely, but I think we brought these proceedings, involving the companies we thought were the eight largest. They have approximately 80 percent of the market.

And our purpose is to deal with those restrictions which have a significant impact on competition, and I believe we will. I also believe that the cases we have brought should provide an adequate remedy.

Mr. Bangert. Well, if you are successful in this case, would you see that as establishing precedent for the other sirup manufacturers and bottlers! In other words, would you expect that they would have to

give up their exclusive territories?

Mr. WARD. Well, I am not even sure of the extent to which other manufacturers currently maintain territorial restrictions. I believe that many of the other soft drink products are not sold under territorial restrictions, and I think some of our investigations have indicated that some territorial restrictions that were in existence have been discontinued.

Mr. Bangert. I have no further questions.

Senator HART. Mr. Chumbris?

Mr. Chumbris. Thank you, Mr. Chairman.

First, Mr. Ward, I want to welcome you to our subcommittee. I believe this is your first appearance since you were appointed to your position.

I also want to welcome Mr. Barnes, who we know of for a long period of time, and Mr. Wilson and Mr. Nelson to the subcommittee. There is no doubt that we have a good problem, a controversial

problem, and one of significance.

Once we had an economist before us and he testified on oil import quotas, and he said, "Well, gentlemen, the political question is yours. I tell the story as I see it." And you told your story.

Yesterday, we had Mr. Kauper before us and he stated what the national policy on antitrust was for the Department, and you stated

But, at the same time, the Congress of the United States must make the decision on this bill, and it has granted exemptions to the antitrust laws of greater severity than the one we are considering here today. So, it is going to be a decision that the subcommittee, full committee, and the Congress is going to have to take on this particular problem, and I will preface it with that thought in mind.

Now, you made one statement about \$100 million is going to cost for consumers. Now, we get a lot of figures, not only this hearing, but in other hearings, but usually when that figure is given, there is

only one side of a coin that is always brought out.

For instance, in the oil import quota hearings, a figure of \$2 million by one department, \$4 million by another department—\$4 billion I should say-I would be talking in billions-but, when you look at the other side of the coin, on the oil import quota being restricted, the money that was coming in through the economy of the United States by more workers and by taxes and et cetera, offset that \$4 billion or \$5 billion figure, whichever one you use.

So, in the sense here, the question is going to be decided whether this—if this statement that these people make is true, and if they don't get this bill, they are going to lose their franchises, and if those franchises go to fewer people, then their position would be that the fewer the franchisees, maybe then they will be in a position to charge whatever figure that they want, and the consumer is going to pay by that route.

So, you have to look at it from both sides of the coin.

I only have one other point I wanted to make, and that is on the statistics that you have given from 1947 to date.

Now, of course, 1947 goes way back, because there are a lot of bottlers that may have been absorbed by other bottlers over that

period of time.

But the statistics that we had this morning from Mr. Smith, the president of Coca-Cola, he stated, in 1961, they had 1,039 franchisees, and in 1971, it was reduced to 800, but over a hundred of those were due to franchisees who—a franchisee who consolidated his two operations into one, for whatever reason he did, and that there are only about a hundred franchises that were—that changed hands, other than a merger.

And if that is true, that is far different from the statistics you gave us of 5,300 being dropped down to-5,200 being dropped down to

2,300 since 1947.

Mr. Ward. Yes. Well, there is a difference there. The figures we had used are the only ones we have, they are census figures. I must rely on them. I can't respond to Mr. Smith's figures that they gave this

morning. Perhaps I would be able to later.

Mr. Chumbris. And I think, when discussing this with Mr. Smith this morning, and since your subcommittee has had the question of mergers, and you—the Federal Trade Commission has come before us many, many times, that the era of 1961 through 1971 was a very active one in mergers in many industries.

But to have it reduced to what amounts to, let us say, 10 percent of that 1,023 bottlers changing hands, that is 10 percent. That is a very

good average.

Now, you gentlemen are making studies on that all the time, and Senator Cook was here this morning to point out that in another industry it went from some 6,000 down to a figure below about 200 and some in another industry.

So, I think that this particular industry has done pretty well as far as maintaining its level over the past 10 years-1,023 franchisees to

800 that it has in 1971.

Mr. Ward. Well, if you lose 10 percent of the businesses, that is a substantial number of companies that have gone out of business, particularly in this industry which has enjoyed a pretty considerable rise

in consumption.

I was struck by the comment by the witness this morning that as markets get bigger, the companies serving them inevitably get fewer. I would have thought the precise opposite, that as markets become bigger, competitive opportunities become more available, that you probably ought to have a rise in the number of companies that are competing in the market.

And I would think that any time an industry or a company loses 10 percent of its franchisees, that you have to look at the individual

situations to find out what the competitive effect was.

Mr. Chumbris. Over a 10-year period—that is why I asked Mr. Smith if he could compare the soft drink industry with other indus-

tries that you people study all the time, that that ratio of 10 percent

is far less than any one.

For instance, the dairy and the ice cream business and the bakery business—now, we are studying all those on a selling below cost hearing that we have, and we have had people coming in and telling us how much their businesses have been reduced, and how they have been absorbed, et cetera.

So, as far as 10 percent, it may be high, but in comparison with what is going on in this country, today, 10 percent is pretty good, pretty stable for the soft drink people; and, as I again say—and I'll close with this—this is a decision that the Congress is going to make—

36 Senators.

And I point out, you talk about the nine metropolitan areas, but the Senators who introduced this bill are from the less populated areas

of America.

And as I look at that map over there, the 10 largest Coca-Cola bottlers—the white spots that you see are the Senators who introduced that bill. They are the ones who are worried about protecting their little bottlers. They are not concerned about those big bottlers over there.

You look at that map over there, and I do not think there is a Senator who is on that bill from that particular area. I know no Senator from California, Illinois, or New York is on this bill—the Senators from the white spots that you see up there—the little guys.

And that, I say, it is a political question.

Senator Hart. I just wanted to reassure the economist that Mr. Chumbris does not mean that the politicians and the Congress listen to the economists to tell us what good economic sense there is, and then

we go and count the votes and make our judgment on that.

Mr. Chumbris. That is not exactly the way the witness put it. He says, "I understand you fellows have a problem. You have to weigh it. You have to weigh the small part of the State as against the big part of the State. You have to weigh the economies of it. You have to weigh the question of jobs. You have to weigh all those things."

That is a political question.

The economist may say—look at it strictly from an economic philosophy. This is the way I think you ought to do it. You do not have to follow me, but this is the way the economist thinks it ought to be done.

And the Representatives of the people have to look at it from how it is going to affect the people in their States, and how it is going to affect the people in the Nation—if we want everything by the rule-book.

Senator HART. I think what we are saying is that—to use Mr. Chumbris' example from the map—and assuming it is correct that the sponsors of these bills come from that very large white area, and they are worried about their small bottlers—we have to balance the interests of those small bottlers against the existence of I do not know how many million consumers who happen to live in the white area, too

And it is this that constitutes the very easily spoken, but not always

identified, public interest problem that we have got ourselves.

Mr. Chumbris. Of course, the consumer, according to the statement of Mr. Smith, which you discussed with him this morning, is that the price of Coca-Cola in that large bottle is still the same cents per

ounce as it was about 70 years ago. So the consumer certainly has not hurt any in that instance, if that is a true fact. I do not know, but that is what the witness said.

Senator Hart. I am sure it is a correct fact; and, as a noneconomist,

I was struck by it. I commented on it.

I suppose the economist would say, "Yes, but you should have followed up your question with what new technologies have developed in 70 years that might have been available to reduce even further the initial introductory price?" And I am sure economists think that way.

Mr. Ward. Yes, sir. I did not hear the statement, but I was told that the comparison was not in the cost of the units that are usually sold. It may have been made on the basis of a very high price at some time in

the past, that would not be truly representative.

Actually, we took the BLS data comparison of a six-bottle carton of identical size returnable bottles in 1960 and compared it with 1970, and that was the basis for our statement that the price increase in cola soft drink prices was 64 percent in that period of time. I mean, those are some statistics on the other side.

Now, I am not aware what the comparison was—Mr. Chumbris. He used the big bottle in his—

Mr. Ward. And they didn't see them in big bottles in 1902, or whatever, but I am not sure what the comparison was. I think that there may be some other explanations for that nice comparison.

Senator Hart. Mr. Kern?

Mr. Kern. In previous testimony, Mr. Ward, it has been stated that the territorial franchise system has itself maximized the availability to the consumer of the soft drink products. I suppose the other side of the coin would be that an ending of the territorial franchise system would very much, if not minimize, would at least reduce the availability of these products to the consumer. Do you buy that?

Mr. Ward. Competition does not always have that effect. It seems to me that there are many other industries which do not have territorial limitations and where distribution is to every available outlet or as

many competitive outlets as possible.

I would think that the experience with postmix indicates that you can get very wide distribution to every little crossroads of that particular soft-drink item. That, of course, is not a manufacturing operation, but it seems to me that there are many other industries which have complete distribution on a competitive basis. Now, when you are beginning to distribute a product, or you have a new product, frequently some sort of protection or territorial limitation will increase the product coverage.

I do not think that that effect continues. The industry sells \$5 billion worth of soft drinks, and the consumer demand for those products will be satisfied. And I doubt that the anticompetitive restric-

tions are necessary to see that that is accomplished.

Mr. Kern. How about under the present circumstances?

Mr. Ward. Well. Mr. Wilson indicates to me that we have developed instances where, because of the territorial protection, some brands are not available in a market, because a bottler who has the franchise for one may not desire to distribute the other. So there is another side to that coin, as well.

Mr. Kern. You mentioned, in New York, that Dr Pepper and—was it Coca-Cola?—were bottled by the same company?

Mr. Ward. Coca-Cola Co. of New York. I believe, yes.

Mr. Kern. Have you found evidence that competition has been

manipulated between these products in the New York area?

Mr. WARD. No, I wouldn't say that. I would say that the fact that they are both distributed by the same company would minimize the likelihood of price competition between them, though both would have to be sold in some competition.

In other words, territorial limitations do not completely eliminate

competition. We do not argue that.

Mr. Kern. Thank you.

Mr. Chumeris. Mr. Chairman, let me read into the record the statement so it will be in point.

Coke sold in food-wait a minute-the average current price per ounce of Coca Cola, when purchased in 16-ounce, returnable bottles, is the same as it

Coke sold in food stores, in nonreturnable packages, is priced on average 30 to 40 percent higher than coke in returnable bottles. The difference lies essentially in the different costs of packaging. The cost of returnables is spread over many uses. But the cost of the nonreturnable package is absorbed in one use.

And considering the fact that the increase in cost of wages and equipment and the packages and everything else, that is a remarkable

And on the question of the two different types of products in the New York area, it might be interesting to know that—you might be interested in knowing that—in one of our hearings, not too long ago, the question came up, "Why should not a gasoline station be able to sell gas A, B, and C, rather than just one gas, at a gasoline station?"

So, it works both ways.

Mr. WARD. I might agree with that comment on gasoline.

Mr. CHUMBRIS. But you disagree with it on the question of 7-Up and Coca-Cola?

Mr. WARD. Well, the concentration of the markets is a little bit different there.

Senator Hart. And----

Mr. WARD. And the territorial limitations, also.

Senator Hart. I was going to compliment the Commission on its success in obtaining the talents of Mr. Ward, even before he told me he sort of shared my view, that gas is gas. Seriously, this is our first time to publicly welcome you, and we do compliment you and the Commission. Your background is outstanding.

Mr. WARD. Thank you.

Senator HART. Are there any further questions?

(No response.)

Senator Hart. Did any of your associates want to make any comment or react to anything?

Mr. WARD. No. No, thank you, Mr. Chairman.

Senator Hart. Thank you again.

(Exhibits follow. Testimony resumes on p. 322.)

FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION. Washington, D.C. September 15, 1972.

Hon. PHILIP A. HART,

Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Senator Hart: Enclosed is a corrected copy of the transcript of my testimony of August 9, 1972, at the hearings on S. 3133 and related bills, which would make lawful territorial restrictions in food distribution.

During the hearings you permitted me to have my prepared testimony made part of the record. Information concerning Westinghouse Electric Corporation, set forth in my prepared testimony, was based in part on an erroneous news report. In order that an accurate record be compiled in these hearings, I respectfully request that my prepared testimony be amended to reflect what I believe to be an accurate description of the Westinghouse bottling operations. I have enclosed herewith copies of pages 8 and 9 of my testimony which show the necessary corrections. I will appreciate your courtesy in allowing these corrections to be made.

You have also requested that I comment upon my letter of June 7, 1971, to Senator Buckley, and similar letters to other members of Congress, which included a statement that the soft drink companies were entitled to a full trial on the merits if they so elected, in view of the fact that complaint counsel are now

seeking partial summary decision in the soft drink cases.

The letter to Senator Buckley was written during the time period when proposed complaints were outstanding and the matters were in the consent negotiation stage. The statement referred to the fact that the soft drink companies did not have to enter into consent orders, but could elect a full trial on the merits if they so desired.

My remarks were also intended as a general statement of the rights afforded to all respondents under due process of law. Any party to litigation is entitled to his "day in court." By the same token, summary decision is a simplifying process fully consistent with due process of law. It can expedite the judicial process by eliminating the necessity for full evidentiary hearings. It can do so, however, if, and only if, there is no dispute as to the essential facts and the moving party is correct on its interpretation of the law. The principle that summary decision has a valid place in the antitrust laws was recently reaffirmed in two Supreme Court decisions, United States v. Topco Associates and Federal Trade Commission v. The Sperry & Hutchinson Company. Both of these cases were decided after my letters to Senator Buckley and other members of Congress were written, and in part influenced our decision to move for partial summary decision.

The question to be resolved by our motions for partial summary decision is solely the legal issue as to whether, in light of facts which are undisputed, the admitted territorial restrictions are illegal under the Sherman Act and therefore in violation of Section 5 of the Federal Trade Commission Act. Only a partial summary decision is sought because we recognize that genuine issues of fact do exist as to the nature and extend of the relief appropriate to remedy the effect

of the alleged violation.

Because the applicable law appears certain and the relevant facts are undisputed, it seemed unwise to forego this legal procedure and its potential to simplify these proceedings and produce a more expeditious resolution of these matters. Of course, respondents will have ample opportunity to present their views on the propriety of our motions summary decision. If their views prevail, we will proceed to introduce evidence during trial which we believe will prove the anticompetitive effects of the challenged territorial restrictions. If the motions are granted, however, substantial time and resources will be sayed.

I appreciate the opportunity to present these additional views to the Sub-

committee.

Sincerely,

ALAN S. WARD, Director, Bureau of Competition.

FEDERAL TRADE COMMISSION, Washington, D.C., May 11, 1971.

Re: Corres. No. 008828. Hon. LAWTON CHILES,

U.S. Senate, Committee on Government Operations,

Washington, D.C.

Dear Senator Chiles: This is in response to the April 28, 1971, request of Mr. Kennedy that we submit in writing the matters we discussed during our meeting of April 27, 1971.

At issue in the soft drink proceedings is the legality of the practice by these soft drink firms to restrict the operations of the bottler, ostensibly an independent businessman, to a specifically designated geographic sales area. Soft drink firms typically sell their particular brand name syrup to local bottlers who then bottle it in combination with various ingredients, principally water and sugar,

and sell the brand name soft drink products to retailers, but only in his designated area. The Commission by this action seeks to assure the right of those independent bottlers to compete in an unfettered manner by selling where and to whom they desire, and also the right of retailers to buy at competitive prices

from several rather than one bottler.

Supreme Court decisions of the last decade declare illegal under the antitrust laws restrictions by a manufacturer on the territories or the customer to whom manufacturers' dealers may sell. In addition, as I pointed out at our meeting, market division among competitors, which is involved in several of these cases, has been considered illegal under the Sherman Act since 1898 and under the common law since the Seventeenth Century. The existence of these restrictions in the soft drink industry is inconsistent with the goals of our competitive economic system. The Congress and the courts have fashioned our antitrust laws to serve as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. As you know, our antitrust laws are premised on the belief that an unrestrained interaction of economic forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time permitting minimal governmental regulation and an environment conducive to the preservation of our democratic, political and social institutions. The history of our antitrust laws manifests their importance in preserving economic liberty and thereby providing a favorable environment for the existence of our political and social institutions.

We believe that the effect of this proceeding will be to decrease the concentration level in the soft drink bottling industry, which is quite high presently, and make it more competitive. Currently, concentration in local markets is determined by territorial restrictions which the soft drink companies impose upon their bottlers. The effective area in which a bottler can compete is much larger than the area in which they are confined. Consequently, freeing bottlers from territorial restrictions will enable bottlers to compete over wider geographic areas thereby lessening concentration levels by increasing the number of bottlers competing in each area. In addition, bottlers in a particular area will be subjected to potential competition from bottlers outside of their natural trading areas which will have the tendency of keeping their prices down. To the extent that some bottlers are unable to compete effectively and go out of business their loss will be more than offset by the creation of intrabrand competition which currently is

totally foreclosed by territorial restrictions.

Although there are many similar soft drinks being sold under different brand names, interbrand competition, or competition between bottlers of different brands, in the soft drink industry is not effective because of its anti-competitive structure. Within many major metropolitan markets, concentration is extremely high. For example, only four firms account for 74 percent of sales in the Baltimore metropolitan area, and four firms account for 80 percent of sales in the Boston metropolitan area. Economic theory tells us that given such high concentration ratios, consumers are bound to pay higher prices. One means by which competition can be effectively increased in metropolitan areas such as Baltimore and Boston is to allow intrabrand competition from nearby bottlers. We feel that the effect of this economic experience has demonstrated that prices are lowest where competition exists. The restrictions on the bottlers prevent any competition between bottlers of the same brand and thus artificially raise prices. The existence of interbrand competition does not diminish the importance of competition between bottlers of the same brands-intrabrand competition. Intrabrand competition is particularly important in an industry such as this one in which the effectiveness of interbrand competition has been diminished by its anticompetitive structure. We believe that both intrabrand and interbrand competition must exist if we are to expect consumer prices to be at competitive levels. Moreover, territorial restrictions interfere with the individual freedom of choice of a bottler to operate as a free and independent businessman. Increasingly, the Supreme Court has emphasized the right of independent dealers to run their businesses as they see fit.

Freeing independent bottlers from territorial restrictions will make available to all bottlers the opportunity to serve a bigger market. Some smaller bottlers have expressed concern that this opportunity will permit the larger bottlers to begin competing in the smaller bottlers' presently protected territories and to drive the smaller bottlers out of business. The possibility of this occurring seems

exaggerated.

Small bottlerrs in our view will not be driven from business by large bottlers for a number of reasons. First, small bottlers according to industry spokesmen have many advantages, including lower labor costs, lower rent payments, and far lower overhead costs. Furthermore, many of these small bottlers are located in close proximity to the major warehouses operated by the food chains and thus would be in a better position to secure business from such chains than would a bottler located in the central city. Small bottlers are also protected to a certain extent by the limits on shipping soft drinks. Thus in less densely populated regions of the country the small bottler would only need fear competition from another small bottler, not from a large, big city bottler whose transportation costs to reach the small bottler's market would be prohibitive. Of course, if large bottlers engage in predatory pricing practices with respect to small bottlers, they will be violating the Robinson-Patman Act, or other antitrust laws.

During our conference we emphasized that territorial restrictions not only shield small bottlers, they also protect large bottlers. Although the bottling industry is often characterized as being composed of small family-owned companies, it appears that in actuality the number of small bottlers has greatly declined in recent years and large multi-plant bottlers are becoming predominant. For example, in the State of Florida the following large companies operate:

### Bottling Plants Owned By Syrup Producers:

1. National Industries (Cott), Miami.

2. Norton Simon, Inc. (Canada Dry), Jacksonville, Miami, Riviera Beach, Tampa, West Palm Beach.

3. Royal Crown Cola Co., Jacksonville, Miami, Orlando, Tampa.

### Bottling Plants Owned By Large Bottlers:

1. General Cinema, Jacksonville (Pepsi) (Sales—129 million—69) Jacksonville (7 Up) (Headquarters, Boston, Mass.) Gainesville (Pepsi) Miami (Pepsi, 7 Up) Ocala (7 Up).

2. Associated Coca Cola Bottling Co., Inc. (Sales—\$78 million—69)—Daytona Beach (Headquarters—Daytona Beach) Kissimmee, Sarasota.

Tampa.

3. Burger Brewing Co., Fort Lauderdale (Pepsi), (1969 Sales \$25 million)

West Palm Beach (Pepsi), (Headquarters, Cincinnati).

Adjustments which occur in the soft drink industry because of the elimination of these restrictions will promote free competitive enterprise in this unregulated sector of our economy. The Commission, under the mandate set forth in its organic Act, is directed to initiate a complaint if to believe exists that this law is being violated, and that action by it would be in the interest of the public. To continue to permit suppression of intrabrand competition through the use of territorial restrictions in this long-established segment of our nation's food industry, which has annual sales in excess of four billion dollars at wholesale, would be contrary to the public interest as well as the laws and principles which underlie our economic system.

We appreciated the opportunity of receiving your views on April 27, 1971, and

hope that our reply will be of some assistance to you.

Sincerely yours,

ERNEST G. BARNES, Assistant Director, Bureau of Competition.

### UNITED STATES OF AMERICA

### BEFORE FEDERAL TRADE COMMISSION

### Docket No. 8855

IN THE MATTER OF THE COCA-COLA COMPANY, A CORPORATION; COCA-COLA BOTTLING CO. (THOMAS), INC., A CORPORATION; COCA-COLA BOTTLING WORKS (THOMAS), INC., A CORPORATION; AND COCA-COLA BOTTLING WORKS, 3RD, INC., A CORPORATION

### MOTION BY COMPLAINT COUNSEL FOR PARTIAL SUMMARY DECISION

To: Hearing Examiner Andrew C. Goodhope:

Pursuant to section 3.24 of the Commission's Rules of Practice, complaint counsel move for partial summary decision on the issue of whether respondents'

admitted territorial restrictions violate Section 5 of the Federal Trade Commission Act. No genuine dispute exists among the parties concerning any

material fact relevant to a favorable disposition of this motion.

The Coca-Cola Company and the other named respondents in this matter, by contractually limiting the areas in which independent bottlers licensed by them can sell soft drink products under the various trademarks held by The Coca-Cola Company, have created vertical territorial restrictions and horizontal market divisions, both of which are illegal under the Sherman Act and therefore violate Section 5 of the Federal Trade Commission Act.

Because the law as to the legal question here at issue is so well developed, granting partial summary decision determining that these challenged vertical restrictions and horizontal market divisions violate Section 5 would constitute a decision amply warranted by the undisputed facts of record and having

a wholly sustainable basis in law.

However, since a genuine issue of fact does exist as to the nature and extent of the relief appropriate in this matter, only a partial summary decision to dispose of this legal issue is here sought. Subsequent to this partial summary decision being granted, hearings pertaining to relief considerations should commence to provide a record upon which a full and final decision can be predicted.

Respectfully submitted.

ROBERT B. LEE, DAVID I. WILSON, MARK M. HOUGH. Complaint Counsel.

### Statement of Undisputed Facts

I. The Complaint in this matter was issued on July 15, 1971. II. No date has yet been fixed for the adjudicatory hearing.

III. By Answer of August 26, 1971, respondent The Coca-Cola Company

a. admits that it is a corporation organized, existing and conducting its business under and pursuant to the laws of Delaware, and that it maintains an office and its principal place of business at 310 North Avenue, N.W., Atlanta, Georgia 30313 (Coke Answer; Paragraph 3);

b. admits that it sold or shipped syrup or concentrate to approximately 900 domestic bottlers located throughout the United States (Coke Answer: Para-

graph (3); c. admits that through its Coca-Cola U.S.A. division it is engaged principally in the manufacture and sale of syrup and concentrate for the processing and sale of soft drinks under one or more of its trade names such as "Coca-Cola", "Tab", "sprite", "Fresca", "Fanta", and "Simba" (Coke Answer; Paragraph 4):

d. admits that it licenses its bottlers to use its syrup or concentrate and other ingredients to process and package soft drink products for sale to retailers

under such trade names (Coke Answer; Paragraph 4);

e, admits that it has subsidiaries which operate bottling plants in 26 cities of the United States and sell soft drink products to retailers in the areas thereof

(Coke Answer; Paragraph 4);

f. admits that the Thomas companies have operated for many years as parent bottlers pursuant to bottling agreements with it, and that said Thomas companies were granted certain rights, subject to the terms of said bottling agreements with respect to the bottling and sale in certain designated territories of soft drinks only under the "Coca-Cola" trade names and not under the other trade names used by Coca-Cola in its soft drink business, that said Thomas companies are engaged principally in the purchase of syrups from Coca-Cola for resale to numerous bottlers who process and sell Coca-Cola in bottles and cans pursuant to bottling agreements (Coke Answer; Paragraph 4);

g. admits that it is engaged in commerce with the definition of the Federal

Trade Commission Act (15 U.S.C. 44) (Coke Answer, Paragraph 5);

h. admits that it is in active competition with other corporations, firms, partnerships or persons engaged in the manufacture, processing, distribution and sale of syrups, concentrates or soft drink products in commerce (Coke Answer; Paragraph 6);

i. admits that it has contracts with bottlers and that it has consented to contracts between bottlers and the Thomas company respondents and that said contracts include territorial restrictions such as those alleged in the Complaint:

<sup>&</sup>lt;sup>1</sup> A Statement of Disputed Facts is attached hereto. It shows that all facts relevant to granting this motion are admitted by respondents' Answers to the Complaint.

". . . Company agrees to furnish to Bottler, and only to furnish for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of Bottler in the territory herein described.

"... Company does hereby select Bottler as its sole and exclusive customer and licensee for the purpose of bottling the Bottlers' bottle syrup, Coca-Cola, in

the territory described.

[Bottler agrees] . . . not to use trademarks Coca-Cola or Coke, nor bottle nor vend said product except in the territory herein referred to. This limitation, however, is not to prevent Bottler from acquiring similar rights for other territory.

"[Bottler agrees] . . . not to use said distinctive [Coca-Cola] bottle for any other purpose than the bottling of Coca-Cola, and not in any territory except as

herein referred to." (Complaint; Paragraph 6).

IV. By Answer of August 24, 1971 respondents Thomas Companies

a. admit that respondent Coca-Cola Bottling Co. (Thomas), Inc., is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware, and that it maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee 37402 (Thomas Answer; Paragraph 3);

b. admit that respondent Coca-Cola Bottling Works (Thomas), Inc., is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware, and that it maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee 37402

(Thomas Answer; Paragraph 3);

c. admit that Coca-Cola Bottling Works 3rd, Inc., is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware, and that it maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee 37402 (Thomas Answer;

Paragraph 3);

d. admit that as of June 1968 respondent Thomas company had contracts with 122 first line bottlers in twelve states, that these first line bottlers had contracts with 45 sub-bottlers in eleven states, that respondent Thomas Works had contracts with 38 first line bottlers in four states, that these first line bottlers had conracts with 13 sub-bottlers in two states; that respondent Works 3rd had contracts with 5 first line bottlers in two states (Thomas Answer; Paragraph 3);

e. admit that respondents Thomas and Thomas Works have operated for many years as parent bottlers under an agreement with The Coca-Cola Company by which they were granted certain rights from The Coca-Cola Company with respect to the sale of Coca-Cola soft drink products in their territories and that Works 3rd operates under a contract with Thomas, and that they sell bottlers syrup for the processing of bottled Coca-Cola and B-X syrup for the processing of Coca-Cola pre-mix to bottlers who process bottled Coca-Cola and Coca-Cola pre-mix and sell said products to retailers and consumers (Thomas Answer; Paragraph 4);

f. admit that they are engaged in commerce within the meaning of the Federal

Trade Commission Act (15 U.S.C. 44) (Thomas Answer; Paragraph 5);

g. admit that they are in active competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of syrup, concentrate and soft drink products in commerce (Thomas

Answer; Paragraph 6);

h. admit that they have contracts with their bottlers which restrict them from using the Coca-Cola trademark name or selling bottled soft drink products bearing the Coca-Cola trademark name outside the territories in which the bottler has been licensed to use the Coca-Cola trademark name or to bottle and sell soft drinks under the Coca-Cola trademark name. The restrictions appear in written contracts with the bottlers which convey to the bottlers the exclusive right to use the Coca-Cola trademark name in connection with bottled soft drink products in designated territories and to be the sole bottler and vendor of such products using the Coca-Cola trademark name in said territories, and admit that a typical bottler contract contains territorial restriction provisions such as those alleged in the Complaint:

". . . to obtain and furnish to party of the second part [bottler] and only to obtain, not the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of party of the second part in the territory herein described, provided party of the first [licensor] can obtain the delivery to it of such syrup from The Coca-Cola Company under the contract existing between

the party of the first part and The Coca-Cola Company.

"[To select bottler] . . . as its sole and exclusive customer and licensee for the purpose of bottling Bottlers' Coca-Cola syrup, and using the name Coca-Cola thereon in the territory herein described."

In consideration therefor, bottler agrees:

". . . Not to use the name Coca-Cola nor bottle nor vend said product except in the territory herein referred to without the written consent of party of the first part and The Coca-Cola Company. This limitation, however, is not to prevent party of the second part from obtaining such rights from parties authorized to use the name Coca-Cola and to bottle and vend said product.

". . . To order, for the purpose of bottling Coca-Cola, the distinctive bottle, and none other, adopted or that may be adopted by party of the first part; to use said distinctive bottle and none other, in bottling Coca-Cola, and not to use said distinctive bottle for any other purpose than the bottling of Coca-Cola, and not in any territory except as herein referred to without the written consent of party of the first part and The Coca-Cola Company." (Complaint, Paragraph 6).

# UNITED STATES OF AMERICA

# BEFORE FEDERAL TRADE COMMISSION

# (Docket No. 8855)

IN THE MATTER OF THE COCA-COLA COMPANY, A CORPORATION; COCA-COLA BOTTLING Co. (THOMAS), INC., A CORPORATION; COCA-COLA BOTTLING WORKS (THOMAS), INC., A CORPORATION; AND COCA-COLA BOTTLING WORKS 3RD, INC., A CORPORATION

MEMORANDUM BY COMPLAINT COUNSEL IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DECISION

I

#### INTRODUCTION

The Granting Of Partial Summary Decision Is Amply Warranted By The Undisputed Facts of Record And Has A Wholly Sustainable Basis In Law.

A. The Facts Relevant To A Partial Summary Decision Are Undisputed. Partial summary decision determining that the vertical territorial restrictions and horizontal market division here alleged violate Section 5 of the FTC Act is urged by complaint counsel on the undisputed facts of record, since these allegations are wholly sustainable as a matter of law. Respondent, The Coca-Cola Company, selis soft drink syrups and concentrates to its independent franchised bottlers, operating over 800 plants, which mix these with other ingredients and sell the resultant products to retailers under Coca-Cola's trademarks. By express contract provisions, Coca-Cola limits the areas within which each of its bottlers may sell soft drink beverages under its trademarks. Not only does this allocation of bottling territories among these independent bottlers constitute an illegal vertical territorial restriction, but because Coca-Cola operates bottling plants in 26 major metropolitan areas, these restrictions also constitute an illegal division of markets among competitors. On the basis of these restrictions, which are admitted by respondents' Answers, complaint counsel urge that because the applicable legal precedent is so well developed and the relevant facts are undisputed, granting partial summary decision as to the illegality of these restraints on competition constitutes the appropriate manner in which to resolve the fundamental legal question presented by this matter.

Summary decision is urged as to both The Coca-Cola Company and the other named respondents in this matter (hereinafter collectively referred to as the Thomas Companies), since the latter have long-standing agreements with Coca-Cola wherein they purchase syrups and concentrates from it for resals to their independent franchised bottlers who operate over 200 plants in a large area of the United States. These bottlers operate under the same territorial restrictions as do Coca-Cola bottlers except that their contracts are with the Thomas Companies. The Coca-Cola Company, however, is a party to these contracts.

The restrictive clauses preventing bottlers from selling Coca-Cola soft drink products outside of a specified area have been part of the franchise agreements between Coca-Cola and the Thomas Companies and their respective bottlers since the inception of the franchise system in the soft drink industry. These agreements make it clear that no bottler, whether franchised or wholly-owned by Coca-Cola, may sell Coca-Cola products outside the area specified in that contract. These agreements bring about the total elimination of competition

among Coca-Cola bottlers in the sale of Coca-Cola products.

B. The Propriety Of Partial Summary Decision Is Made Manifest Both By The Letter and By The Spirit Of the Antitrust Laws. Respondents' territorial restrictions completely eliminate competition between and among Coca-Cola bottlers. This elimination of competition is directly contradictory to a fundamental tenet of our free enterprise system—that the marketplace determines where a businessman's products are sold. Here the judgment of the respondents is substituted for that of the free market in determining where bottlers may sell Coca-Cola products. These agreements offend the doctrine against restraints on alienation, since, by their utilization, Coca-Cola is able to direct the final disposition of soft drink beverage products long after it has sold the concentrate ingredient used in the production of those beverages.

Recent judicial interpretation of antitrust law allows no doubt concerning the anticompetitive effects of market division among competitors. The Attorney General's Committee to Study the Antitrust Laws, 26 (1955) has stated that agreements among competitors to divide markets have no other purpose than the elimination of competition. Since the purpose of such territorial restrictions has been found by the courts to be of such an inherently anticompetitive nature, no inquiry into their reasonableness need be made. Past judicial experience establishes that the threat to competition posed by respondents' practices here challenged is so great that no justification whatever can excuse their existence. Thus, these practices fall within that category of antitrust violations which, because of their pernicious effect on competition, are conclusively presumed to

be unreasonable wherever they are found to exist.

Partial summary decision will establish that the specific practices here challenged violate both the letter and the spirit of the antitrust laws. Such a partial summary decision would be based on the classic rationale of restraint of trade and injury to competition which is at the heart of the antitrust laws. Since the adverse effects of respondents' challenged practices have been so well established by prior judicial decisions, reliance on those decisions, without more, will resolve the legal issues here present. Indeed, to attempt to ascertain the precise nature of the resulting anticompetitive effect would serve only to protract the final adjudication and disposition of this matter. The Supreme Court has not only recognized the propriety of granting partial summary decision in situations such as that here present, but also has acknowledged that such a procedure, "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often fruitless when undertaken." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

C. Hearings As To Appropriate Relief Considerations Should Be Held Following A Partial Summary Decision. Only partial summary decision is sought because unresolved issues of fact exist concerning the appropriate relief. Consequently, since the existence of a significant impairment of competition is recognized by granting the partial summary decision here sought, development of a record would be necessary to provide a basis upon which the Commission may order such relief as it finds necessary or appropriate. Indeed, hearings on the question of relief should be commenced immediately subsequent to the granting of this motion in order to develop a record of evidence sufficient to support appropriate remedial action. Particularly relevant to such hearing on relief would be evidence pertaining to those three factors specifically referred to by the Commission in its preamable to the notice orders: (1) protection of the consuming public, (2) the competitive conditions in the soft drink industry,

and (3) the protection of the competitive viability of small bottlers.

Clearly, any relief here should unfetter the significant market for Coca-Cola products from the anticompetitive conduct which has precluded any competition among Coca-Cola bottlers, and open this market to competition. The forces of this new competition must be nurtured so as to correct for their past illegal suppression in a manner that will best serve the public interest. Issuance by the Commission of a remedial order such as that proposed herein, is the proper

means to that end.

In fashioning an appropriate remedial order, the basic goal sought to be achieved is the attainment of relief that will create a marketplace environment in which small bottlers are accorded a full opportunity to become competitively viable by such expansion as will enable them to realize their economies of scale. This opportunity to prosper and compete must not be aborted at its inception by established, large bottlers. Hence, as a protective measure, we propose an initial 10 year period during which these small bottlers may accommodate themselves to this new marketplace environment without having to face directly competition from large Coca-('ola bottlers which enjoy established positions, particularly in large metropolitan markets. Means of this very nature were recently recognized by the Supreme Court as appropriate in restoring and encouraging competition adversely affected by illegal anticompetitive conduct. Sce. Ford Motor Co. v. United States, 5 CCH Trade Reg. Rep. 73,905 (1972) at 97,765.

As is made manifest by the following legal memorandum and discussion regarding appropriate relief considerations, respondents' Answers to the Complaint provide ample basis for the disposition of the principal legal issue in this matter

by partial summary decision.

#### LEGAL MEMORANDUM

The Law Being So Well Developed As To The Manifest Illegality of Respondents' Territorial Restrictions, Sound Judical Policy Compels Partial Summary

Decision On The Undisputed Facts Here Present

A. Because No Genuine Dispute As To The Facts Exists, the Illegality of Respondents' Territorial Restrictions Can be Readily Determined by Partial Summary Decision Procedure. Summary decision procedure presents a method of simplifying litigation by permitting resolution of legal issues by motion rather than trial where there is no dispute as to the essential facts between the parties. Section 3.24(a) (2) of the Commission's Rules of Practice provides for summary decision if, "there is no genuine issue as to any material fact and . . . the moving party is entitled to such decision as a matter of law." Rule 56 of the Federal Rules of Civil Procedure is to the same effect and, in fact, the Commission's rule was patterned after that federal rule. Lehigh Portland Cement Co., Docket No. 8680, Opinion and Order Vacating Initial Decision and Remanding for Further Proceedings (January 5, 1971).

This simplifying procedure has a long history of use in antitrust litigation. Scc. e.g., Associated Press v. United States, 326 U.S. 1. (1945) (group boycott); International Salt Co. v. United States, 332 U.S. 392 (1948), Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (tying arrangements); United States v. United States Gypsum, 340 U.S. 76 (1950) (agreement among competitors to fix prices

and monopolize the gypsum board industry).

Of course, the courts have been understandably reluctant to use summary judgment procedure "in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System Inc., 368 U.S. 464, 473 (1962). This proceeding, however, presents a completely different situation. Motive and intent are irrelevant and the proof of the violation is present in respondents' bottler agreements, not in the hands of hostile witnesses. Respondents have admitted the only relevant factual issue, namely the existence of territorial restriction provisions in their bottler agreements. Therefore, this case is precisely the kind contemplated as proper for summary judgment in Poller, "when the pleadings, depositions, affidavits and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c) Fed. Rules Civ. Proc." Id. at 467. See, also, First Nat. Bank v. Citics Service, 391 U.S. 253, 288 (1968). Consequently, the use of partial summary decision procedures to resolve whether the territorial restrictions here challenged are illegal is manifestly appropriate.

B. Respondents' Territorial Restrictions Constitute an Unlawful Restraint on the Freedom of their Bottlers to Sell their Products Where They Please. Under respondents' bottling franchise agreements, no bottler may sell Coca-Cola soft drink products outside of a given area. Similar restrictive provisions have been declared illegal by the Supreme Court. In United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967), a case which involved Schwinn's imposition of terri-

torial restrictions on its bicycle distributors, the Court held.

"Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be

traded after the manufacturer has parted with dominion over it. White Motor [v. United States, 372 U.S. 253 (1963)]; Dr. Miles [Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)]. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." (emphasis added)

Recently, in a unanimous decision, the Supreme Court reaffirmed this doctrine. Federal Trade Commission v. Sperry & Hutchinson Co., 5 CCH Trade Reg. Rep. ¶73,861 at 91,612, n. 6 (1972). The Court noted that the Commission could arguably have relied upon the Schwinn doctrine in determining the lawfulness of restrictions on trading stamps instead of turning to other considerations, "less'

'technical' and more deeply rooted in antitrust policy."

Because violations of the Sherman Act are also violations of Section 5 of the Federal Trade Commission Act, Federal Trade Commission v. Cement Institute, 333 U.S. 683, 693 (1948), the Schwinn doctrine is applicable to this matter. For as the Court held in Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 464, (1941), if the practice of respondents runs "counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition. See also, Sperry & Hutchinson Company v. Federal Trade Commission, 432 F.2d 146, 150 (5th Cir. 1970) where the court stated that the Commission had the power to declare unfair "(1) a per se violation of antitrust policy; (2) a violation of the letter of either the Sherman, Clayton or Robinson-Patman; or (3) a violation of the spirit of these acts as recognized by the Supreme Court of the United States."

Lower court decisions, with but one exception, have construed Schwinn to hold that territorial restrictions are illegal: Janel Sales Corp. v. Lanvin Perfumes, Inc., 396 F.2d 398, 406 (2d Cir. 1968); cert denied, 393 U.S. 938 (1968); Hensley Equipment Co. v. Esco Corp., 383 F.2d 252, 263 (5th Cir. 1967); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 720 (further proceeding affirming the temporary restraining order requiring shipments of products outside of the area in which the dealer had been restricted), 417 F.2d 621 (2d Cir. 1969); Sherman v. Weber Dental Mfg., 285 F. Supp. 114, 116 (E.D. Pa. 1968); Chapiewsky v. V. G. Heilman Brewing Co., 1969 Trade Cases ¶ 72,712 (W.D. Wis. 1969); Fagan v. Sunbeam Lighting Co., Inc., Eastern, 303 F. Supp. 356, 361 (S.D. Ill. 1969); United States v. Glaxo Group Ltd., 302 F. Supp. 1, 8-11 (D.D.C. 1969); (further proceeding) 5 CCH Trade Reg. Rep. ¶ 73,190 (D.D.C. 1970). The sole exception is Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir. 1970), cert denicd, 400 U.S. 821 (1970), which concerned restrictions on the sale of products with potentially hazardous effects on consumers' health, to persons other than statelicensed barbers and beauticians. Clearly, there are no potentially hazardous products involved in this proceeding. Indeed, few food products exist which are less dangerous than soft drinks. Rather, involved here is a restriction on the area in which independent bottlers can resell their products. Moreover, Tripoli appears inconsistent with the holding in Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 450 (1940), which involved restrictions on the resale of a gasoline additive to particular purchasers. These restrictions were found by the Court to be unlawful.

Of particular significance here, in considering this subsequent interpretation of Schwinn by the lower courts, is that in Glaxo, the district court granted the government's motion for summary judgment on the ground that Glaxo's restriction on its licensee's reselling of a particular drug in any form except dosage form was admitted. This was held to constitute an illegal restraint on alienation of products after their sale, and therefore illegal under the Schwinn doctrine.

The Schwinn Company attempted to justify its restrictive agreements on the basis that they provided an effective method for distributing its goods. In reject-

ing this argument, the Court observed

"But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription, because in a sense, every restrictive practice is designed to augment the profit and competitive position of its participants. Price fixing does so, for example, and so may well-calculated division of territories." (388 U.S. at 375. (emphasis added)

Consequently, there can be no justification for respondent's illegal conduct

in this matter.

C. Respondents' Territorial Restrictions Constitute an Illegal Division of Markets Among Competitors. Because the Coca-Cola Company operates bottling plants in 26 major metropolitan areas of the United States, the restrictive territorial provisions result in an illegal division of markets among competitors. outside of the territories allocated to them by Coca-Cola, al inldependent bottlers licensed by Coca-Cola to do business in areas near which Coca-Cola itself has wholly-owned bottling operations, would be actual competitors of such Coca-Cola Company bottling operations. Obviously, this potential competition is foreclosed by the territorial restrictions provisions in the bottlers' contracts which prohibit them from selling outside their assigned territories. By agreeing not to compete outside of the territories allocated to them by Coca-Cola, all independent bottlers within reasonable marketing proximity have contracted that they would not compete with Coca-Cola's wholly-owned bottling operations. Likewise, Coca-Cola has contracted not to compete with any such bottler.

These restrictive agreements also constitute a division of markets between Coca-Cola's wholly-owned bottlers and the Thomas Companies' bottlers which are prevented from competing with each other by the restrictions in the Thomas Companies' bottlers contracts to which both Coca-Cola and the Thomas Companies are parties. Moreover, the territorial restrictions amount to a market division among Coca-Cola's independent bottlers and the Thomas Companies' bottlers which are prevented from competing with each other by the restrictions in their respective contracts. Because of the substantial sales of soft drink by Coca-Cola's bottler operations in 26 cities in the United States, the horizontal aspect of this proceeding presents a very significant market division case.

Market division agreements between competitors have been declared illegal by the Supreme Court since United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899). Other cases in which this principle was upheld include United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951) and United States v. National Lead Co., 332 U.S. 319 (1947). The Attorney General's Committee to Study the Antitrust Laws, 26 (1955), has stated that agreements among competitors to divide markets have no purpose other than the elimination of competition. As the Supreme Court noted in *Burke* v. *Ford*, "When competition is reduced, prices increase and unit sales decrease." 389 U.S. 320, 322 (1967). Thus, the effect of market-allocation agreements is similar to price-fixing agreements in that both types of agreements adversely affect prices and both are considered illegal under the antitrust laws.

With the Supreme Court's recent decision in United States v. Topco Associates. 5 CCH Trade Reg. Rep. ¶ 73,904 (1972), there can be absolutely no question as to the illegality of horizontal market division agreements. There the Court held "We think that it is clear that the restraint in this case is a horizontal one. and, therefore, a per se violation of Section 1 [of the Sherman Act]. Id. at 91,751. In making its decision, the Court specifically rejected a rule of reason approach to market division and found that market division among competitors was illegal

without any further inquiry into the justifications for such a division.

Topeo involved a member-owned marketing organization which acted as a common purchasing agent of private label food and non-food products for 25 mediumsized food chain firms. Challenged were the provisions of the membership agreements which specified the areas in which Topco members could sell Topco-label products. Also challenged were the provisions of the agreements which required members to obtain permission to expand the sales of Topco products into another member's territory. Upon consideration of the facts presented in Topco the Court stated:

"One of the classic examples of a per se violation of Section 1 [of the Sherman Actl is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that '[hlorizontal territories limitations . . . are naked restraints of trade with no purpose except stifling of competition.

(citations omitted) Id.

Because horizontal market restrictions are inherently illegal, no justification of them is possible. Nevertheless, respondents in this matter assert that these territorial restrictions provide an effective method for marketing their soft drink products. A similar argument of justification was rejected in United States v. Masonite, 316 U.S. 265 (1942). Although this was a price-fixing case, the Attorney General's Committee to Study the Antitrust Laws, discussed supra, points out the similarity of the two practices. In Masonite the Court stated

"Since there was price-fixing, the fact that there were business reasons which made the arrangements desirable to the appellees, the fact that the effect of the combination may have been to increase the distribution of hardboard, without

increase of price to the consumer, or even to promote competition between dealers, or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for pricefixing than were the 'competitive evils' in the Socony-Vacuum case," 315 U.S. at 276.

Parties to market division agreements have often argued that such agreements are necessary to protect the members of the agreements from ruinous competition. In 1898, this argument was first rejected in Addyston Pipe & Steel, 85 Fed. 271, 219 (1898), aff'd., 175 U.S. 211 (1899), where the Court held that ". . . however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, [the agreement] was void at common law. . . . . "

That such justification arguments have this long history of judicial rejection results from the underlying fallacy upon which they are based. This fact was made manifest once more by the decision in Topco. There, the Supreme Court in again rejecting such an argument, i.e., that limiting interbrand competition caused a greater good by fostering interbrand competition, said as to such restraints of trade "... the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco brand products. Without territorial restrictions, Topco members may indeed '[c]ut each others throat.' Cf. White Motor Co., supra, at 279-280 (Clark J., dissenting). But we have never found this possibility sufficient to warrant condoning horizontal restraints of trade." 5 CCH Trade Reg. Rep. at 91,752.

Neatly summed up by the Topco decision is the law upon which these argu-

ments have consistently been rejected by the Court:

"In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." 5 CCH Trade

Reg. Rep. at 91,752.

D. Summary Decision Should be Granted Since the Undisputed Facts Prove Two Clear Violations of the Antitrust Laws. Section 3.24(a)(2) of the Commission's Rules of Practice requires the granting of Summary Decision when there is no genuine factual dispute and to moving party is correct on its position as a matter of law. In this matter neither Coca-Cola nor the Thomas Companies dispute the existence of the restrictive territorial provisions in their

bottler contracts. Thus, there is no dispute as to the essential facts.

Schwinn, reaffirmed by Sperry & Hutchinson, makes it clear that restraints imposed on independent businessmen by a franchisor after he parts with dominion over his product will be struck down without further inquiry into their reasonableness. And, since these contracts prevent competition between Coca-Cola's wholly-owned bottlers and Coca-Cola's independent bottlers, between Coca-Cola's wholly-owned bottlers and Thomas' bottlers, and between Coca-Cola's independent bottlers and Thomas' bottlers, the existence of a market division is apparent. Topco leaves no doubt that market division is among those restrictive practices as to which the law is so well developed that it is illegal without any further inquiry into its reasonableness. Therefore, no question can exist as a matter of law as to the illegality of respondents' restrictive agreements. Accordingly, summary decision should be granted.

## III

# APPROPRIATE RELIEF CONSIDERATIONS

A. Hearings held subsequent to partial summary decision will require substantially less evidence and will be oriented fully to appropriate relief considerations. Partial summary decision would recognize the violations here challenged to be of that type "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," Northern Pac, Ry. v. United States, 356 U.S. 1, 5 (1958). Therefore, the evidence required in rendering a full and final decision in this matter would be substantially reduced, and the criteria for relevance oriented toward an effective remedial order rather than proof of a violation. To facilitate rendering such an order, a procedure should be established by which those considerations relevant to fashioning an appropriate remedy would be agreed upon among the parties prior to the commencement of any hearings as to relief. We recommend that establishing a statement of relevant issues as to the nature of evidence to be received at such relief hearings should be a task accomplished among the parties at a prehearing conference held immediately following partial

summary decision.

Although the amount of documents, witness testimony and other evidence required to render a full and final decision is substantially reduced when no need exists for elaborate inquiry as to harm caused or business excuse, the exercise of the commission in formulating a remedial order must, of course, be founded on considerations supported by evidence of record. A rational connection between the facts found and the choice made must be articulated in its opinion. Whatever the order ultimately issued in this matter, it will be valid only if it represents a determination of policy or judgment which the commission is authorized to make upon findings adduced from the evidence of record presented for its consideration. See, FTC v. Sperry & Hutchinson Co., supra. As is apparent from an evaluation of those issues here stated, hearings held subsequent to partial summary decision to elicit evidence pertaining to such issues will develop an ample record upon which an appropriate remedial order can be based.

Ample broad equity powers exist to enable fashioning any order as may be found appropriate to remedy this violation of antitrust law. Whatever the relief here ordered, it must unfetter the large soft drink market which exists for brand name soft drink products of The Coca-Cola Company from the anticompetitive conduct which has foreclosed any significant intrabrand competition, and open to this new competition a market long closed by those illegal restraints imposed by respondents. The forces of this new competion, nevertheless, must be nurtured so as to rectify its past unlawful suppression in a

manner that will best serve the public interest.

B. The Assured Competitive Viability of Small Bottlers Is Fundamental to Both the Protection of the Consuming Public and Competitive Conditions in the Soft Drink Industry. The public interest in effective competition, the consideration which is paramount in fashioning any antitrust remedy, is best served in this matter by fashioning relief in a manner which would assure the competitive viability of small bottlers. The Commission decision in Eko Products Co. recognized that ". . . in any case within the jurisdiction of the Commission, the question to be asked in fashioning a remedy should be: What kind of order within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective 'to cure the ill effects of the illegal conduct, and assure the public freedom from its continuance (United States Gypsum Co. v. United States, 340 U.S. 76, 88)?", 65 F.T.C. 1163, 1215 (1964).

Of course, the purpose of any order is to restore, so far as practicable, competitive conditions to at least the state of health which they might have been expected to enjoy but for the unlawful conduct. The public interest is best served by opening to competition the market which has been closed by the illegal restraints here challenged. International Salt Co. v. United States. 332 U. S. 393, 401 (1947). This basic goal will be best achieved in this matter by such relief as will create a market-place environment in which small bottlers

can become competitively viable.

The defeat there held by the Supreme Court to exist was that the Commission did not properly find S&H's practices to be unfair competitive methods apart from their propriety under the antitrust laws. Rather, although the Commission opinion was premised on the classic antitrust rationale of restraint of trade and injury to competition, its argument on appeal to sustain that opinion urged that a Section 5 violation can be upheld even where there exists an adverse impact on consumers without regard to competition. While the Supreme Court acknowledged this argument to be completely accurate, it held that the Commission did not properly perform its administrative function to render an opinion that linked its findings and its conclusions, even though the record may have contained adequate evidentiary support to do so. By contrast, in this matter, an adverse impact on competition devoid of any excuse or justification can be found by partial summary decision because the challenged practices are obviously so destructive of competition that their existence constitutes sufficient evidence to establish a violation under Section 5. That the Commission can so act here in this summary manner was recognized by the Circuit Court's delineation in so det here in this summary manner was recognized by the Circuit Court's delineation in so the first through the supreme Court &dH decision noted that the practice there involved was arguably proscribed by its prior decision in Schwinn, which also involved restraints obviously unlawful in light of those types of violations achieved restraints obviously unlawful in substitute of the supreme Court schwinn precedent and instead unnecessarily pursuing "considerations less technical" and more deeply rooted in antitrust law." See, 5 CCH Trade Reg. Rep. ¶ 73,861 at 91,612–13, n. 6. The defeat there held by the Supreme Court to exist was that the Commission did not at 91,612-13, n. 6.

Small bottlers must be afforded the opportunity to grow to a size at which they can realize the necessary economies of scale to enable them to effectively compete with large bottlers. In order that such opportunity not be aborted, we propose that for a limited period of years, small bottlers be afforded protection from large bottlers. Also The Coca-Cola Company would be prevented from selling outside its present bottling territories and from acquiring any new bottling territories. The evidence discussed in 3 and 4 below will be relied upon to demonstarte the necessity for this relief.

1. A "Metro Area Bottler Handicap" Provision Will Assure the Competitive Viability of Smaller Bottlers.

The following proviso is proposed as an addition to the first paragraph of the notice order. In essence, this proviso establishes a 10 year period during which small bottlers may accommodate themselves to this new marketplace environment without having to face competition from large bottlers which enjoy established positions in large metropolitan markets. Means of similar nature were recently recognized by the Supreme Court as appropriate in restoring and ecouraging competition adversely affected by illegal anti-competitive conduct.

See, Ford Motor Co. v. United States, supra at p. 4.

Provided, However, that whenever any territory presently assigned to a bottler, or to a bottler and any other bottler in which that bottler enjoys substantial ownership or control, encompasses in excess of 50% of the population of a SMSA that was one of the 200 largest SMSA's in the United States as of 1970, then for a period of 10 years from the effective date of this Order, said respondent shall maintain, pursuant to existing contracts, combinations, understandings or agreements with such bottler, those provisions of the type characterized in Paragraph 1 (a) through (d) above, but only to the effect that such bottler shall not, either directly by itself or thru its customers for resale by them, offer for sale or sell or distribute soft drink products in no area other than that which either (1) comprises a territory assigned to another bottler similarly situated as itself under the criteria heretofore set forth in this proviso, or (2) comprises a territory in which the respondent performs the business of a bottler or is otherwise unassigned to any bottler. Any bottler having annual total soft drink product sales of less than \$2 million during its prior fiscal year is excluded from the operation of this proviso for the period of the subsequent fiscal year.

By this proviso, the larger bottlers now doing business in the 200 largest metro areas, or SMSA's (Standard Metropolitan Statistic Area), for 10 years are limited to selling in metro areas and forbidden to sell in any non-metro areas which such large bottlers do not presently serve. Those bottlers having less than \$2 million annual sales are excluded from this provision. Thus small bottlers located adjacent to a metro area will be freed to sell into that metro area without concern that the metro bottler can retaliate by selling into the small bottler's territory. In seeking to serve an adjacent metro area, a small bottler would face competition from three sources, the present bottler serving that metro area, similarlysituated small bottlers or a large bottler serving another metro area. A large bottler serving one metro area is likely to be at a disadvantage vis-a-vis adjacent small bottlers in serving another metro area as the former would have higher transportation costs than the latter. Consequently, the net effect of the provision is to assure that several bottlers can compete effectively for the business in a given metropolitan area while temporary protection is afforded small bottlers during the period in which they adjust their plant and marketing efforts to realize economies of scale.

These proceedings do not, of course, challenge the lawfulness of syrup manufacturers' restricting a bottler to a particular manufacturing location or the right of a syrup manufacturer to select its bottlers. Hence, even if territorial restrictions are eliminated, the exclusive right remains for a bottler of a particular brand to operate the only plant producing that brand in a territory designated by the syrup manufacturer. The economic advantage of a bottler being the sole producer of a particular brand located in a designated area will remain; however, he will now be confronted by intrabrand competition from products bottled else-

where and shipped into his territory for sale.

2. Additional Relief is Necessary to Assure the Competitive Viability of Small Bottlers.

Coke occupies a strong position in relation to its bottlers. Not only is it the largest Coke bottler, it is also the sole supplier of concentrate to them. Because of this position we propose that Coke be confined to selling soft drinks in its current bottler territories for a period of 10 years.

Coke has been an active acquirer of its bottlers, purchasing ten bottlers since 1960, all of whom were located adjacent to existing Coke bottling operations. It would be anomalous for the Commission to prohibit territorial restrictions which eliminate intrabrand competition, but permit the possibility of intrabrand competition to be snuffed out by Coke's continued acquisition of bottlers adjacent to its existing bottling operations. In view of this we propose that Coke be prohibited from acquiring any of its bottlers for 10 years.

3. Large Bottlers Dominate Soft Drink Bottling in General and Coke Bottling

in Particular.

To show that large bottlers dominate soft drink bottling, evidence of the following nature will be introduced: Four basic types of business organizations operate in soft drink bottling: (1) wholly-owned bottling and canning operations of the syrup manufacturers; (2) bottling plants owned by large conglomerate corporations; (3) large multiplant bottling companies; and (4) medium and small, single-plant bottlers. This evidence will show that firms of the first three types dominate soft drink bottling. They accounted for 62.5% of total industry sales in 1967, the last year for which relevant data are available. Since 1958, the percentage of total industry sales accounted for by all multiplant bottlers (types 1 to 3 above) has steadily increased from 43.3% in 1958 to 50.9% in 1963, and, most recently, to 62.5% in 1967.

Annual surveys by an industry trade journal, Soft Drinks, document the rapidly increasing importance of large bottling plants and the even more rapidly declining importance of small and medium-sized plants. The number of soft drink bottling plants dropped from 3.501 in November 1968, to 2,990 in November 1971. During this time, the percentage of total soft drink sales accounted for by plants with an annual sales volume of over \$2 million increased from 54%to 65%, while the percentage of total soft drink sales accounted for by plants

with annual volume of \$500,000 or less fell from 16% to 10%.3

We will also show that large Coke bottlers dominate the sale of Coke products. For example, the 21 largest Coke bottlers serve one-half of the United States

population.

4. Large Bottlers Enjoy Relative Advantages as Compared to Small Bottlers. That the demise of small bottlers is encouraged by territorial restrictions will be shown by evidence of the following nature: By confining small bottlers to artificial markets too small to support efficient-sized plants, territorial restrictions have encouraged them to sell their businesses to large bottling companies. The number of soft drink bottlers has declined from 5200 to 2300 in the last 25 years. There has been a similar decline in the number of Coca-Cola bottlers.

Respondent has actively encouraged such acquisitions.

Typically, several small bottlers of the same brand operate near metropolitan areas. Evidence will be presented to illustrate how small bottlers who have attempted to grow to efficient-size have found themselves blocked by territorial restrictions, When Coca-Cola Bottling Co. of Taft, California (Taft) attempted to expand its sales by selling canned soft drinks, manufactured for it by The Coca-Cola Company, to a food broker who resold to customers in the territory of Coca-Cola Bottling Co. of Los Angeles, Coca-Cola refused to sell it sufficient canned products to supply its new customers. Ironically, Coke refused in spite of the fact that Los Angeles Coke was selling into Taft's territory. For Taft the ability to sell its products outside of its small territory had been an opportunity to survive. The Coca-Cola Company had informed Taft by letter that it should sell its business since its assigned territory was too small to support an efficient plant. Other small Coke bottlers have had similar experiences with Los Angeles Coke, which continues to sell into the territories of these small bottlers. However, The Coca-Cola Company has restricted the sales of canned soft drinks to them in order to prevent them from selling into Los Angeles Coke's territroles in spite of sales by Los Angeles Coke into their territories. Testimony regarding this situation will illustrate the necessity for the protective provision to assure competitive viability of small bottlers when freed of territorial restrictions and given a fair opportunity to compete.

1963 and 1967. From annual "How's Business Survey", Soft Drinks January 1969 at 35, January 1972 at 23.

<sup>&</sup>lt;sup>2</sup> Compiled from data included in Department of Commerce, Enterprise Statistics, 1958,

In summary, evidence will establish that territorial restrictions in the soft drink industry contirbute to the decline in the number of bottlers. Small bottlers have been denied the opportunity to continue in the industry by expanding their sales and growing to efficient-size. Rather, they have been induced to *leave* the industry through merger. Upon the removal of territorial restrictions they must be given an opportunity to expand their operations to the point at which they can support an efficient plant, and compete effectively with larger bottlers.

5. The Proposed Temporary Protective Provisions Must Be Adopted if the

Maximum Number of Small Bottlers Are to Become Competitively Viable.

Evidence presented on this point will be largely enoclusionary based upon the evidence discussed in 3 and  $4\ supra$ , i.e., a showing that large bottlers dominate soft drink bettling and the relative advantages of large bottlers as compared to small bottlers.

C. The Proposed Order Will Enable Small Bottlers to Become Competitively Viable. Small bottlers have the ability to serve much wider areas, i.e., natural markets, rather than those artificial territories to which they are currently restricted. This is due to the great changes in transportation and distribution systems which have taken place since the territorial boundaries were established. Ending these restrictions would allow small bottlers, now confronted with serving an uneconomically small territory, to serve the major metropolitan areas located

within several hundred miles of their existing plants.

Soft drink firms not hampered by territorial restrictions serve larger areas in general than do the franchisees of the top eight syrup manufacturers. For example, Shasta has 13 distribution areas which roughly correspond to the major areas served by large food wholesalers and retailers. A similar pattern of plant location corresponding to the marketing areas of food wholesalers is found in Safeway's soft drink bottling operations and in such regional soft drink firms as Graf's in the Milwaukee area and Faygo in the Detroit area. These non-franchised bottlers have found that transportation costs do not keep them from serving an area substantially larger than that served by the average franchised bottler. Small Coke bottlers who have ignored the territorial restrictions have been able to sell in much larger areas than the areas to which respondents have attempted to restrict them.

Although ending territorial restrictions will not save all small bottlers it will insure that more will ultimately survive than would otherwise be the case. Without the restrictions, many small bottlers, all of whom have the ability to serve larger areas, may grow large enough to support an efficient-sized plant. The proposed metro bottler handicap remedial provision should assure the existence of many bottlers which would otherwise leave the market. Furthermore, mergers among many of the small bottlers would create efficient-sized plants. In addition, small bottlers could pool their resources to create jointly-owned production cooperatives. For instance, many bottlers currently obtain their canned soft drinks from canning cooperatives. Assisting more smaller bottlers to survive will cause more competition and lower prices to exist than would be true in the absence of the proposed protective provisions.

#### IV

#### CONCLUSION

As shown by this memorandum, because the law as to the legal question here at issue is so well developed, granting a partial summary decision which determines that the challenged vertical restrictions and horizontal market divisions violate Section 5 of the Federal Trade Commission Act would constitute a decision amply warrented by the undisputed facts and having a wholly sustainable basis in law. Furthermore, subsequent to partial summary decision being granted, hearings pertaining to relief consideration may be commenced so as to provide a record upon which a full and final decision can be predicated. Accordingly, complaint counsel urges that the Motion for Partial Summary Decision be granted.

Respectfully submitted

ROBERT B. LEE,
DAVID I. WILSON,
MARK M. HOUGH,
Complaint Counsel.

#### CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed to the following counsel a copy of the attached Motion By Complaint Counsel For Partial Summary Decision, and a Memorandum in support thereof.

MARK M. HOUGH, Complaint Counsel.

JULY 31, 1972.

Richard Rogers, Esquire, Kirkland & Ellis, Hodson, Chaffetz & Masters, 2900 Prudential Plaza, Chicago, Illinois 60601; Edward Wolfe, Esquire, White and Case, 14 Wall Street, New York, New York 10005; Fred Freund, Esquire, Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, New York 10002; James Wallace, Esquire, Kirkland, Ellis, Hudson, Chaffetz, Masters, and Rowe, 1176 K Street, N.W., Washington, D.C. 20006; Charles Kadish, Esquire, Proced Abbott & Margan, 1 Chase Marshaftar, Plaza, New York, New York, 10005. Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, New York 10005; Breed, Abbott & Morgan, I Chase Manhattan Plaza, New York, New York 10005; W. D. White, Esquire, White, McElroy and White, 2505 Republic National Bank Tower, Dallas, Texas 75201; Gordon B. Spivack, Esquire, Lord, Day & Lord, 25 Broadway, New York, New York 10004; Earl W. Kintner, Esquire, Arent, Fox Kintner, Plotkin & Kahn, 1815 H Street, N.W., Washington, D.C. 20006; James G. Frangos, Esquire, Pepsico, Ind., Purchase, New York 10577; Leroy Jeffers, Esquire, Vinson, Elkins, Searls & Smith, First City National Bank Building, Houston, Texas 77002; Nolan Murrah, Jr., Esquire, 1000 Tenth Avenue, Columbus, Georgia 31902; Edward Rockefeller, Equire, 1625 K Street, N.W. Columbus, Georgia 31902; Edward Rockefeller, Equire, 1625 K Street N.W., Washington, D.C. 20006; Robert J. Sisk, Esquire, Hughes Hubbard & Reed, One Wall Street, New York, New York 10005; George M. Lawson, Esquire, The Coca-Cola Company, P.O. Box 1734, Atlanta, Georgia 30301; Willis B. Snell, Esquire, Sutherland, Asbill & Brennan, 900 17th Setreet N.W., Washington, D.C. 20006; Guy Beatty Esquire, Miller, Martin, Hitching, Tipton, Lenihan & Ware-bares, Volunteer State, 145, Phyllding, Chatterpage, Phylogenes 27402 house, Volunteer State Life Building, Chattanooga, Tennessee 37402.

# UNITED STATES OF AMERICA

# BEFORE FEDERAL TRADE COMMISSION

#### (Docket No. 8859)

IN THE MATTER OF NATIONAL INDUSTRIES INC., A CORPORATION: AND COTT CORPORATION, A CORPORATION

#### COMPLAINT

The Federal Trade Commission, having reason to believe that National Industries Inc. and its wholly-owned subsidiary, Cott Corporation, each hereby made and sometimes hereinafter referred to as respondent(s), have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: For the purposes of this complaint, the following

definitions shall apply

(a) Bottler-any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacturing and sale, primarily at wholesale, of pre-mix or post-mix syrups or soft drink products or who purchases pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(h) Central warehousing—a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail

outlets or wholesalers:

(c) Concentrate—the basic soft drink ingredient sold to bottlers by respondents, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) Consignment—a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who

is indistinguishable from a salesman or agent;

(e) Place of business—the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with six ounces of carbonated water to produce

600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a premix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings;

(h) Soft drink products—nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through pre-

mix and post-mix systems or the like.

PARAGRAPH TWO: Respondent National Industries Inc., is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Kentucky. It maintains its office and principal place of business at 510 West Broadway, Louisville, Kentucky 40201. In 1968, respondent National

Industries Inc. had net sales of \$353,310,000 and assets of \$283,771,000.

Respondent Cott Corporation, a wholly-owned subsidiary of National Industries Inc., is a corporation organized, existing and conducting its business pursuant to the laws of the State of New Hampshire. It maintains its office and principal place of business at 197 Chatham Street, New Haven, Connecticut 06513; owns and operates a concentrate manufacturing plant at Hamden, Connecticut; and operates soft drink bottling plants at South Portland, Maine, Millis and Somerville, Massachusetts, Pawtucket, Rhode Island, New Haven, Connecticut, Manchester, New Hampshire, Bronx, New York, Elizabeth, New Jersey, Braddock, Pennsylvania and Miami, Florida. In 1968, respondent made sales to over 100 domestic bottlers located in 29 states throughout the United States.

PARAGRAPH THREE: Respondent National Industries Inc., through various subsidiaries, is engaged in diverse businesses including sale of soft drink products and concentrate, dairy products, laboratory furniture, energy products and steel service centers. Its Consumer Products Division, with which respondent Cott Corporation is affiliated, accounted for \$215,383,000, or 57% of total revenue in

Respondent Cott Corporation is engaged principally in the manufacture and sale of soft drink products and concentrate under its name, Cott, and under the names of its wholly-owned subsidiaries, Clicquot Club Company and Mission of California, Inc. In addition to its business as a bottler, respondent Cott sells soft drink products and concentrate to over 100 bottlers, who purchase under license to produce and sell soft drink products under such trade names of respondent as "Cott," "Clicquot Club," "Mission," "Quiky," "Energade" and "Big Giant Cola." Bottlers combine the concentrate with water and other ingredients and then package the mixture in bottles and cans for resale as soft drink products to retailers.

PARAGRAPH FOUR: Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that National Industries Inc., through its wholly-owned subsidiary Cott Corporation, causes a continuous flow of interstate commerce in soft drink products and concentrate to exist between Cott Corporation headquarters and production facilities in New Haven and Hamden, Connecticut, and the numerous bottlers and retailers located

throughout the United States which purchase their products.

PARAGRAPH FIVE: In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, proc-

essing, distribution and sale of soft drink products in commerce.

PARAGRAPH SIX: Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix concentrates and soft drink products sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the franchise agreement between respondents and their bottlers.

A typical agreement between respondent Cott Corporation and its bottlers

provides that the bottler agrees:

"To aggressively merchandise, promote, advertise and maintain the sales and distribution of Products in the territory covered by this Franchise Agreement, and to restrict distribution of Products produced by BOTTLER within the territory covered by this Franchise Agreement, and not permit the shipment, either directly or indirectly, of Products produced by BOTTLER into territories outside of the territory covered by this Franchise Agreement. In the event any other authorized franchise of Products should, without authority of COMPANY, ship or permit to be shipped, any Product or Product Base into the exclusive territory covered by this Franchise Agreement, (except where said other authorized franchisee sold and delivered said Product Base to a customer within their territorial limits) COMPANY agrees to take appropriate action to prevent the continuation of such unauthorized acts, but shall not be liable in damages to the BOTTLER by reason of such unauthorized shipments, COMPANY's obligations in this respect being limited to the exercising of the highest good faith to prevent such act or acts."

PARAGRAPH SEVEN: The aforesaid agreements used by respondent Cott

have had, and may continue to have, the following effects:

(a) Competition between and among respondent Cott's bottlers in the distribution and sale of "Cott," "Clicquot Club," "Mission," "Quiky," "Energade" and "Big Giant Cola" brands of soft drink products has been eliminated:

(b) Competition between and among Cott's bottling operations and its bottlers in the distribution and sale of Cott soft drink products at the

wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Cott," "Clicquot Club," "Mission," "Quiky," "Energade" and "Big Giant Cola" brands of soft drink products from the bottler of their choice at a competitive price; and

"Clicquot Club," "Mission," "Quickly," "Ener-(d) Consumers of "Cott," gade" and "Big Giant Cola" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted

market and at competitive prices.

PARAGRAPH EIGHT: Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix concentrates and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 15th day of July 1971, issues its complaint against said respondents.

#### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of September A.D. 1971, at 10 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building 11th & Pennsylvania Avenue, N. W., Washington, D.C., as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have

been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision

containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to respondents might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

ORDER

Ι

IT IS ORDERED that respondents National Industries Inc. and its wholly-owned subsidiary, Cott Corporation, and the officers, agents, representatives, employees, successors and assigns, of each respondent, directly or through any corporate or other device, in connection with the advertising, merchandising, offering for sale and sale or distribution of soft drink products, concentrate, premix syrup or post-mix syrup, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in any act, practice or conduct having like or similar purpose or effect.

2. Imposing or attempting to impose any limitations or restrictions respecting: (a) the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell pre-mix or post-mix syrups, or soft drink products; (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any act, practice or conduct having like or similar purpose or effect.

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are sold; or in any way penalizing any bottler because of the: (a) territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups; (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sales to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, or imposing or attempting to impose any requirement, that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or attempts to sell, soft drink products, or pre-mix or post-mix syrups.

II

IT IS FURTHER ORDERED that respondent National Industries Inc. shall within sixty (60) days after service upon it of this order serve upon all bottlers of respondent Cott Corporation soft drink products a copy of this order along with a copy of the attached letter on National Industries Inc. official company stationery and signed by the president of each respondent.

### III

IT IS FURTHER ORDERED that the respondent National Industries Inc. shall forthwith distribute a copy of this order to each of its subsidiaries.

IT IS FURTHER ORDERED that respondent National Industries Inc. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that each respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied

with this order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this. its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 15th day of July, A.D., 1971.

By the Commission.

[SEAL.]

CHARLES A. TOBIN. Secretary.

The Federal Trade Commission has entered an order against National Industries Inc. and Cott Corporation which among other things prohibits them from limiting, allocating or restricting the territory, persons or class of persons to whom our bottlers may sell. In addition, the order prohibits National Industries Inc. and Cott Corporation from restricting the location of the bottler's place of business or requiring an allocation of fees between one bottler and other bottlers

for sales to any particular customer or in any geographical area.

National Industries Inc. and Cott Corporation are also prohibited from refusing to sell or threatening to refuse to sell to any bottler anything used in the manufacture and sale of soft drink products. Furthermore, National Industries Inc. and Cott Corporation are prohibited from requiring or requesting any bottler to, in any manner, inform them of the territories in which, or the person or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or attempts to sell, soft drink products, or pre-mix or post-mix syrups. A copy of the order is attached.

The Federal Trade Commission has expressed its intention to determine the effect upon the marketing of soft drink products caused by the attached order by ascertaining at some future date the extent to which sales of soft drink products by bottlers extend to customers outside of previously established, but now pro-

hibited, territorial restrictions.

Very truly yours,

### UNITED STATES OF AMERICA

## BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8859)

IN THE MATTER OF NATIONAL INDUSTRIES, INC., A CORPORATION; AND COTT CORPORATION, A CORPORATION

### RESPONDENTS' ANSWER TO COMPLAINT

Respondents National Industries, Inc. and Cott Corporation, in answer to the complaint herein:

1. Deny each and every allegation of the unnumbered paragraph preceding PARAGRAPH ONE of the Complaint.

2. Acknowledge that counsel supporting the Complaint intend to employ the definitions set forth in PARAGRAPH ONE of the Complaint, but deny that any of such definitions necessarily corresponds to commercial usage and deny that

any of such definitions are binding on respondents.

3. Deny each and every allegation of PARAGRAPH TWO of the Complaint, except admit that respondent National Industries Inc., is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Kentucky. It maintains its office and principal place of business at 510 West Broadway. Louisville, Kentucky 40201. In 1969, respondent National Industries Inc. had net sales of \$353,310,000 and assets of \$283,771,000.

Respondent Cott Corporation, a wholly-owned subsidiary of National Industries Inc., is a corporation organized pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 197 Chatham Street, New Haven, Connecticut 06513; owns and operates a concentrate manufacturing plant at Hamden, Connecticut; and operates soft drink bottling plants at South Portland, Maine, Millis and Somerville, Massachusetts, New Haven, Connecticut, Bronx, New York, Elizabeth, New Jersey, Braddock, Pennsylvania and Miami, Florida. In 1968, respondent made sales to over 100 domestic bottlers located in 29 states throughout the United States.

4. Deny each and every allegation of PARAGRAPH THREE of the Complaint, except admit that the various subsidiaries of respondent National Industries, Inc. are engaged in diverse businesses including the sale of soft drink products and concentrate, dairy products, laboratory furniture, energy products and steel

service centers.

Respondent Cott Corporation is engaged principally in the manufacture and sale of soft drink products and concentrate under its name, Cott, and under the names of its wholly-owned subsidiaries, Clicquot Club Company and Mission of California, Inc. In addition to its business as a bottler, respondent Cott sells soft drink products and concentrate to over 100 bottlers, who purchase under license to produce and sell soft drink products under such trade names of respondent as "Cott," "Cliquot Club," "Mission," "Quiky," "Energade" and "Big Giant Cola." Bottlers combine the concentrate with water and other ingredients and then package the mixture in bottles and cans for resale as soft drink products to retailers.

5. Deny each and every allegation of PARAGRAPH FOUR of the Complaint, except admit that Cott Corporation is a wholly-owned, independent subsidiary of National Industries, Inc. Cott Corporation is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that it causes a continuous flow of interstate commerce in soft drink products and concentrate to exist between Cott Corporation headquarters and production facilities in New Haven and Hamden, Connecticut, and the numerous bottlers and retailers located throughout the United States which purchase their

products.

6. Deny each and every allegation of PARAGRAPH FIVE of the Complaint, except admit that respondent Cott Corporation has been and is now in competition with other corporations, firms, partnerships, and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

7. Deny each and every allegation of PARAGRAPH SIX of the Complaint, except admit that Cott Corporation has entered into agreements with certain bottlers that contain provisions, in substance, as set forth in the third sentence of PARAGRAPH SIX.

8. Deny each and every allegaion of PARAGRAPHS SEVEN and EIGHT of the

Complaint.

#### ADDITIONAL DEFENSES

9. Respondents allege, as a complete defense to the Complaint, that territorial provisions of the type referred to in PARAGRAPH SIX of the Complaint are lawful ancillary rights granted to bottlers, which are reasonable in terms and which have the effect of enhancing competition.

10. Respondents further allege, as a complete defense to the Complaint, that the Complaint fails to join as respondents those bottlers who are parties to the agreements referred to in PARAGRAPH SIX of the Complaint. Should the relief requested by counsel supporting the complaint be granted, these are the parties whose economic interests would be most directly and substantially af-

fected. From this it follows that a complete and just adjudication of the issues raised by the Complaint cannot take place in the absence of these parties. Further, respondents may be severely prejudiced by any disposition of this proceeding that does not bind all parties to the challenged agreements.

WHEREFORE, respondents request that the Complaint herein be dismissed

with prejudice.

Respectfully submitted,

CHARLES KADISH, WILLIAM P. TEDARDS, Jr. BREED, ABBOTT & MORGAN.

1 Chase Manhattan Plaza, New York, N.Y.

# UNITED STATES OF AMERICA

# BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8854)

IN THE MATTER OF DR PEPPER COMPANY, A CORPORATION

#### COMPLAINT

The Federal Trade Commission, having reason to believe that the Dr. Pepper Company, hereby made and sometimes hereinafter referred to as respondent, or Dr. Pepper, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: For the purposes of this complaint, the following defini-

(a) Bottler—any individual, partnership, corporation, association or other tions shall apply: business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central warehousing—a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail

outlets or wholesalers;

(c) Concentrate—the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) Consignment—a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who

is indistinguishable from a salesman or agent:

(e) Place of business—the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products:

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600

six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a premix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) Soft drink products-nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through pre-

mix and post-mix systems or the like.

PARAGRAPH TWO: Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Colorado.

It maintains its office and principal place of business at 5523 Mockingbird Lane. Box 5986, Dallas, Texas 75222. Respondent had sales of \$41,883,072 and assets of \$19,479,696 in 1969. In 1968, Dr. Pepper made sales to over 482 bottlers located in

every state of the United States.

PARAGRAPH THREE: Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 482 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Dr. Pepper." "Dietetic Dr. Pepper" and "Salute. Dr. Pepper bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its bottlers. Dr. Pepper operates bottling plants in three areas of the United States and sells soft drink products to retailers.

PARAGRAPH FOUR: Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in pre-mix concentrate and soft drink products exists between its headquarters and production facilities located in Dallas, Texas, and the numerous bottlers located throughout the United States which purchase its

products.

PARAGRAPH FIVE: In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations. firms, partnerships and persons engaged in the manufacture, processing, distribu-

tion and sale of soft drink products in commerce.

PARAGRAPH SIX: Dr Pepper has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers. A typical agreement between respondent and its bottlers provides that the bottler "... at all times agrees not to sell bottled Dr Pepper outside the said licensed territory and not to sell such product knowingly to any purchaser who intends to place such product for sale outside the said licensed territory . . .

PARAGRAPH SEVEN: The aforesaid agreements used by respondent have

had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Dr Pepper," "Dietetic Dr Pepper" and "Salute" brands of soft drink products has been eliminated;

(b) Competition between and among Dr Pepper's bottling operations and its bottlers in the distribution and sale of Dr Pepper soft drink prod-

ucts at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Dr Pepper." "Dietetic Dr Pepper" and "Salufe" brands of soft drink products from the bottler of their choice at a competitive price: and

(d) Consumers of "Dr Pepper." "Dietetic Dr Pepper" and "Salute" brands of soft drink products have been deprived of the opportunity of obtaining

such products in an unrestricted market and at competitive prices.

PARAGRAPH EIGHT: Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 15th day of July, 1971, issues its complaint against said re-

spondent.

#### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of September, A.D. 1971, at 10 a.m., o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Penna, Avenue, N.W., Washington, D.C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense: and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision

containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to respondent might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

#### ORDER

#### Ι

IT IS ORDERED that respondent Dr Pepper Company, and the officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the advertising, merchandising, offering for sale and sale or distribution of soft drink products, concentrate, pre-mix syrup or post-mix syrup, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or

indirectly: 1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in any

act, practice or conduct having like or similar purpose or effect.

2. Imposing or attempting to impose any limitations or restrictions respecting: (a) the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell pre-mix or post-mix syrups, or soft drink products: (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any act, practice or conduct having like or similar purpose or effect.

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concen-

trate, or the container in which they are sold; or in any way penalizing any bottler because of the: (a) territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups; (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sales to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, or imposing or attempting to impose any requirement, that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bottler sells,

or attempts to sell, soft drink products, or pre-mix or post-mix syrups.

#### II

IT IS FURTHER ORDERED that respondent shall within sixty (60) days after service upon it of this order serve upon all bottlers of its soft drink products a copy of this order along with a copy of the attached letter on respondent's official company stationery and signed by the president of respondent.

#### III

IT IS FURTHER ORDERED that respondent shall forthwith distribute a copy of this order to each of its subsidiaries and operating divisions.

IT IS FURTHER ORDERED that respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 15th day of July, A.D., 1971.

By the Commission.

[SEAL.]

CHARLES A. TOBIN. Secretary.

The Federal Trade Commission has entered an order against Dr Pepper Company which among other things prohibits it from limiting, allocating or restricting the territory, persons or class of persons to whom our bottlers may sell. In addition, the order prohibits Dr Pepper Company from restricting the location of the bottler's place of business or requiring an allocation of fees between one bottler and other bottlers for sales to any particular customer or in any geographical area.

Dr Pepper Company is also prohibited from refusing to sell or threatening to refuse to sell to any bottler anything used in the manufacture and sale of soft drink products. Furthermore, Dr Pepper Company is prohibited from requiring or requesting any bottler to, in any manner, inform it of the territories in which, or the person or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or attempts to sell, soft drink products, or pre-mix or post-mix syrups. A copy of the order is attached.

The Federal Trade Commission has expressed its intention to determine the effect upon the marketing of soft drink products caused by the attached order by ascertaining at some future date the extent to which sales of soft drink products by bottlers extend to customers outside of previously established, but now prohibited, territorial restrictions.

Very truly yours,

# UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

(Docket No. 8854)

IN THE MATTER OF DR PEPPER COMPANY, A CORPORATION

Answer of Respondent Dr Pepper Company

To the Honorable Edward Creel, Hearing Examiner: Respondent Dr Pepper Company answers the Complaint in the above case as follows: I.

PLEA TO DISMISS OR TO ABATE FOR NONJOINDER OF INDISPENSABLE PARTIES

As affirmatively appears from Paragraphs Two, Three, Six, Seven and Eight of the complaint herein, and as verified by the affidavit filed herewith as an exhibit and hereby expressly incorporated by reference as a part hereof, this Respondent has written contracts with more than 482 bottlers located in all of the states of the United States under the terms of which each of them is licensed to use and does use the trade name and the trademarks of Dr Pepper Company in the manufacture and sale within the territory licensed to each of them a soft drink under the name Dr Pepper from concentrate or syrup sold to them by Respondent and with the use of formulas furnished to them by Respondent. These bottlers have made very substantial investments in plant and equipment and have each expended substantial effort and substantial sums of money in advertising, developing and promoting the Dr Pepper trade name and trademarks and in developing public favor and goodwill within the licensed territory of each of them for the distinctive soft drink sold under the trade name of Dr Pepper in reliance upon the protection by Respondent of the licensed territory of the individual bottler from sale and delivery therein or shipment to destinations therein of Dr Pepper soft drinks by others who would exploit the Dr Pepper trade name and trademark and the public favor and goodwill for the same and for the distinctive drink sold under the name of Dr Pepper and thereby reap the benefits of the individual bottler's investment and expenditure of effort and money, without the exploiter having made such investment and expenditure of effort and money.

The contracts between Respondent and the bottlers contain restricted territory provisions or protected territory provisions which protect the individual bottlers in their licensed territories from having others exploit and reap the benefits of their investment, expenditures and efforts, in which contract provisions the individual bottlers have valuable vested property rights. No one of such bottlers, all of whom are identified by name and address in the affidavit filed herewith as an exhibit, has been made a party to this proceeding; but each of said bottlers is an indispensable party to this action because the Complaint seeks to have the protected territory provisions of each and all of said contracts in which each and all of said bottlers have valuable vested property rights declared unlawful and as being in violation of § 5 of the Federal Trade Commission Act, and the Complaint and the proposed Order attached thereto seeks to prohibit Respondent from continuing to comply with the restricted territory or protected territory provisions of any of said contracts and to require Respondent to breach such contract provisions with each and all of such bottlers. Such contract provisions cannot be declared unlawful and invalid, and Respondent cannot be lawfully restrained from complying with them in an action to which the bottlers for whose primary benefit

such provisions exist are not parties. Such bottlers can prove their investment of great sums of money in reliance on the protection of these contract provisions; that they have been in effect, known to and unchallenged by the Federal Trade Commission, for many years; and that the attack here made on them is not in the public interest. Invalidating such contract provisions and restraining Respondent from complying with them in a proceeding in which the bottlers, as the primary beneficiaries of such provisions, were not made parties and which action they were given no opportunity todefend would constitute taking their valuable vested property rights in such contract provisions from them without due process of law and would constitute a deprivation of their constitutional rights under the provisions of the Constitution of the United States.

Accordingly, this action should be dismissed or, in the alternative, should be abated for failure to join each and all of the bottlers named in the exhibit filed

herewith as indispensable parties.

EXCLUSIVE AND LIMITED TERRITORY PROVISIONS ARE MERE LAWFUL INCIDENTS TO LICENSING OF TRADE NAME AND TRADEMARKS

The Complaint does not state a claim upon which relief can be granted; and the contract provisions in the agreements between Respondent and the bottlers and compliance with such provisions, upon which the Complaint is based, do not constitute violations of § 5 of the Federal Trade Commission Act because such provisions and compliance therewith are merely lawful incidents to the lawful licensing by Respondent to the various bottlers of the use of its trade name and its trademarks in a described territory covered by the license. Respondent's trade name and trademarks have been registered as provided by the laws of the United States, and the laws of the various states, and are accorded the full protection provided by federal and state law for trade names and trademarks; and by its license agreements with its bottlers and the practices thereunder, Respondent has done nothing more than exercise its lawful ownership of its trade name and its trademarks in a manner fully provided and protected by law. Accordingly, the Complaint should be dismissed.

III.

#### SPECIAL ANSWERS

Respondent answers the numbered paragraphs of the Complaint as follows: Paragraph One: Since the definitions adopted in this paragraph are merely the formulations of Complaint Counsel adopted by them for the purposes of this Complaint, Respondent is not bound thereby and is not required either to admit or to deny the accuracy of the same.

Paragraph Two: Respondent admits the allegations of this paragraph.

Paragraph Three: Respondent admits the allegations of this paragraph except that it should be stated that, as stated in II above, bottlers who purchase concentrate under a license from Respondent are lawfully limited by the license granted to them by Respondent to using Respondent's trade names and trademarks within the licensed territory specifically described in the license agreement. Such trade names and trademarks are fully registered and fully protected as provided by the laws of the United States and the laws of the various states. and limiting the use of such trade names and trademarks by bottlers to the restricted territory described in each license agreement is merely the lawful exercise of Respondent's property rights in its trade names and trademarks.

Paragraph Four: Respondent admits the allegations of this paragraph except as to 55 bottlers located in the State of Texas whose names and addresses are enumerated in the exhibit filed herewith as to whom the allegations of the paragraph are denied. There is no continuous flow of interstate commerce in pre-mix concentrate and soft drink products between Respondent's headquarters and production facilities located in Dallas, Texas, and the 55 bottlers with whom it has contracts located in the State of Texas; but, on the contrary, all of the flow of commerce between Respondent and each and all of these 55 bottlers is wholly

within the State of Texas and is entirely intrastate commerce.

Paragraph Five: Respondent admits that it "has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce"; but it specifically denies that such competition is to any "extent limited by the acts, practices and methods of competition" thereafter alleged in the Complaint and states that such acts, practices and methods not only do not limit but on the contrary advance, foster and promote competition by Respondent with such other corporations, firms, partnerships and persons.

Paragraph Six: Respondent specifically denies the allegations contained in the first sentence of this paragraph and states that exactly contrary to such allegations restricting bottlers from selling outside of the designated geographic area in which they are licensed to use the trade names and trademarks of Respondent promotes,

encourages and aids competition in the sale of soft drinks. The provisions contained in Respondent's license agreements with bottlers referred to in the second and third sentences of this paragraph not only promote, aid and encourage stronger and more vigorous competition between national soft drink companies and in the sale of soft drinks throughout the United States, but such provisions are merely lawful incidents to Respondent's licensing of its trade names and its

trademarks to such bottlers.

Paragraph Seven: Respondent denies all of the allegations of this paragraph. In this connection, Respondent shows that the relevant market for determining the reasonableness and the validity of provisions in Respondent's license agreements with the various bottlers limiting their license to use Respondent's trade name and trademarks is not Dr. Pepper soft drink products but is the soft drink market for which numerous brands of soft drinks sold under numerous trade names compete. This is the product market relevant to the public interest by which the reasonableness of the licensed territory provisions must be measured. The contract licensing provisions attacked in the Complaint and which would be enjoined by the proposed order definitely promote, advance and strengthen interbrand competition between the various competing companies, seeking public favor and acceptance for their brands in the soft drink market

against each other.

Paragraph Eight: Respondent denies all of the allegations of this paragraph. In this connection, Respondent shows that the Complaint herein, if granted, and the proposed Order herein, if entered, would have the effect of lessening competition in the advertising, merchandising, distribution, offering for sale, and sale of pre-mix and post-mix syrups and soft drink products; deprive and continue to deprive the public of the benefits of competition in the purchase of soft drink products; and, further, promote unfair methods of competition and unfair acts or practices in commrece by weakening and eventually eliminating numerous smaller independent bottlers located in smaller towns or cities who could not withstand the greater size and economic strength of the larger bottlers in the big cities who would be enabled to sell in and ship into or cause to be shipped into the licensed territories of the smaller bottlers which are now protected by the provisions which the Complaint and the Order would strike down, by eventually converting the soft drink bottling industry from an industry typically of independent small businesses into an industry dominated by a few large metropolitan companies, by further weakening and aiding in the elimination of the small retailers of soft drinks by the advantages given to large chain-store food organizations enabled to purchase soft drinks in large volumes for warehouse storage and transshipment into the territories in which the small, independent bottlers are now protected by the territory protection provisions herein attacked for sale there in competition with the independent local retailers, and by gradually weakening interbrand competition in the soft drink market through weakening the ability of this Respondent as one of the smaller national soft drink companies to increase its competition with and to increase its share of the market against the national soft drink manufacturers whose brands claim the major shares of the national soft drink market by eliminating or weakening the small, independent bottlers upon whom it is so largely dependent for effective competition with the major soft drink companies.

WHEREFORE, Respondent says that the Complaint in its entirety should be dismissed.

Respectfully submitted,

W. D. WHITE. B. THOMAS McELROY, LEROY JEFFERS, Attorneys for Respondent.

# CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed, properly stamped and addressed, to Robert B. Lee, Esquire, and David J. Wilson, Esquire, Complaint Counsel, Federal Trade Commission, Washington, D.C., true and correct copies of the foregoing Answer of Respondent Dr. Pepper Company this 25th day of August, 1971.

LEROY JEFFERS, Counsel for Respondent.

# UNITED STATES OF AMERICA

#### BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8857)

IN THE MATTER OF THE SEVEN-UP COMPANY, A CORPORATION

#### COMPLAINT

The Federal Trade Commission, having reason to believe that The Seven-Up Company, hereby made and sometimes hereinafter referred to as respondent, or Seven-Up, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: For the purposes of this complaint, the following definitions

shall apply:

(a) Bottler—any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacturing and sale primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central Warehousing—a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to

retail outlets or wholesalers:

(c) Concentrate—the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make postmix and pre-mix syrups;

(d) Consignment—a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who

is indistinguishable from a salesman or agent;

(e) Place of business—the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business head-quarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one-ounce of syrup from a five-gallon tank and mixes it at the point of sale with six ounces of carbonated water to produce 600 six-ounce

finished soft drink servings;

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings; and

(h) Soft drink products—nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through

pre-mix and post-mix systems or the like.

Paragraph two: Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Missouri. It maintains its office and principal place of business at 121 South Meramec. St. Louis, Missouri 63105. Respondent had sales of \$83,255,014 and assets of \$38,894,206 in 1969. In 1968, Seven-Up made sales to over 470 domestic bottlers located in every state of the United States.

Paragraph three: Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 470 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "7-Up," "Diet 7-Up," "LIKE" and "Howdy.' Seven-Up bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers.

Paragraph four: Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its

headquarters and production facilities located in St. Louis, Missouri, and the numerous bottlers located throughout the United States which purchase its

products.

Paragraph five: In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

Paragraph six: Seven-Up has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix concentrates and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agree-

ments between respondent and its bottlers.

A typical agreement between respondent and its bottlers provides that the ... Bottler shall not directly or indirectly sell or distribute 7-Up in any territory other than hereinbefore described."

Paragraph seven: The aforesaid agreements used by respondent have had.

and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "7-Up," Diet 7-Up," "LIKE" and "Howdy' brands of soft drink products has been eliminated;

(b) Innumerable retailers and other customers have been deprived of the right to purchase "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products from the bottler of their choice at a competitive price; and

(c) Consumers of "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products have been deprived of the opportunity of obtaining such products

in an unrestricted market and at competitive prices.

Paragraph Eight: Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix concentrates and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 15th day of July 1971, issues its complaint against said respondent.

#### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of September A.D. 1971, at 10 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Pennsylvania Avenue, N.W., Washington, D.C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been

admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing

such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to respondent might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

#### ORDER

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IT IS ORDERED that The Seven-Up Company, its officers, agents, representatives, employees, successors and assings, directly or through any corporate or other device, in connection with the advertising, merchandising, offering for sale and sale or distribution of soft drink products, concentrate, pre-mix syrup or post-mix syrup, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in any act, practice or conduct having like or similar purpose or effect.

2. Imposing or attempting to impose any limitations or restrictions respecting:
(a) the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell pre-mix or post-mix syrups, or soft drink products; (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any

act, practice or conduct having like or similar purpose or effect.

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are sold; or in any way penalizing any bottler because of the: (a) territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups; (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sales to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, or imposing or attempting to impose any requirement, that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or

attempts to sell soft drink products, or pre-mix or post-mix syrups.

#### II

IT IS FURTHER ORDERED that respondent shall within sixty (60) days after service upon it of this order serve upon all bottlers of its soft drink products a copy of this order along with a copy of the attached letter on respondent's official company stationery and signed by the president of respondent.

TII

IT IS FURTHER ORDERED that respondent shall forthwith distribute a copy of this order to each of its subsidiaries and operating divisions.

IT IS FURTHER ORDERED that respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this

order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 15th day of July, A.D., 1971.

By the Commission.

[SEAL]

CHARLES A. TOBIN, Secretary.

(Official Stationery of The Seven-Up Company)

(Date)

Dear-

The Federal Trade Commission has entered an order against The Seven-Up Company which among other things prohibits it from limiting, allocating or restricting the territory, persons or class of persons to whom our bottlers may sell. In addition, the order prohibits The Seven-Up Company from restricting the location of the bottler's place of business or requiring an allocation of fees between one bottler and other bottlers for sales to any particular customer or in any geographical area.

The Seven-Up Company is also prohibited from refusing to sell or threatening to refuse to sell to any bottler anything used in the manufacture and sale of soft drink products. Furthermore, The Seven-Up Company is prohibited from requiring or requesting any bottler to, in any manner, inform it of the territories in which, or the person or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or attempts to sell, soft drink products, or pre-mix or post-mix syrups. A copy of the order is attached.

The Federal Trade Commission has expressed its intention to determine the effect upon the marketing of soft drink products caused by the attached order by ascertaining at some future date the extent to which sales of soft drink products by bottlers extend to customers outside of previously established, but now prohibited, territorial restrictions.

Very truly yours,

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8857)

IN THE MATTER OF THE SEVEN-UP COMPANY, A CORPORATION

## ANSWER

Respondent. The Seven-Up Company, by its undersigned attorneys, answers the

Complaint herein as follows:

1. With respect to the unnumbered paragraph, Respondent denies that the Commission has reason to believe that The Seven-Up Company has violated Section 5 of the Federal Trade Commission Act or that a proceeding in respect thereof would be in the public interest.

2. Respondent admits that the Commission proposes to use the terms in the Complaint as defined in paragraph one thereof, but Respondent avers that such definitions are subject to clarification and refinement. For example, Respondent avers that pre-mix is not a syrup as alleged in the Complaint, but is a soft drink product. Respondent avers further, with respect to subparagraph (f), that post-mix syrup is not a concentrate, and also that much post-mix syrup is sold by bottlers in non-steel one gallon jugs.

3. Respondent admits the allegations of paragraph two.

4. Respondent admits the allegations of paragraph three, except that Respondent avers that bottlers of Seven-Up products manufacture such products from concentrate, water and other ingredients for original sale to soft drink outlets not only in bottles and cans, but also in pre-mix containers and in post-mix syrup containers.

5. Respondent admits the allegations of paragraph four.

6. Respondent denies the allegations of paragraph five to the extent that they imply that Respondent's business is other than that alleged in the first sentence of paragraph three of the Complaint. Respondent further denies that any acts, practices and methods of competition alleged in the Complaint limit to any extent competition between respondent and other corporations, firms, partnerships and persons.

7. Respondent denies each and every allegation of paragraph six, except that Respondent admits that there are agreements between it and its bottlers which contain territorial provisions reasonably necessary to effectuate the overall objectives of the trademark licensing agreement and that agreements between Respondent and its bottlers contain the language quoted in paragraph six of the

Complaint.

8. Respondent denies each and every allegation of paragraph seven. 9. Respondent denies each and every allegation of paragraph eight.

10. Respondent avers that its contracts, agreements and methods of distribution, including those complained of herein, are lawful in that they are reasonable

and necessary in the proper conduct of Respondent's business.

11. Respondent avers that the provisions complained of are an integral part of the agreements between Respondent and bottlers and, in the context of such agreements, foster opportunity for small businessmen, promote and preserve investment by small businessmen, encourage interbrand competition, enable distribution and service for small retail establishments which they would not otherwise receive, and are thus and otherwise beneficial to competition in the manufacture, processing, distribution and sale of concentrate, pre-mix, post-mix syrup and soft drink products.

## ADDITIONAL DEFENSES

12. The agreements between the bottlers and Respondent, including the provisions complained of, convey valuable rights to the bottlers which would be drastically altered if the relief sought by the Complaint and proposed Order were granted. The Complaint is defective, therefore, for failure to join therein indispensable parties, namely, the bottlers who have entered into the subject agreements.

13. The provisions complained of have been included in soft drink franchise agreements for decades; likewise, the Commission has been aware of the agreements and their basic provisions for many years. This proceeding would impose a penalty or forfeiture and is barred by the statute of limitations.

14. This proceeding is contrary to the public interest.

WHEREFORE, Respondent requests that the Complaint of the Federal Trade Commission in this proceeding be dismissed.

Respectfully submitted.

ARENT, FOX, KINTNER, PLOTKIN & KAHN, By: EARL W. KINTNER, MARK R. JOELSON, 1815 H Street, NW., Washington, D.C.

## CERTIFICATE OF SERVICE

I certify that on the 26th day of August, 1971, copies of the foregoing Answer were served on counsel supporting the Complaint. MARK R. JOELSON.

# UNITED STATES OF AMERICA

# BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8877)

IN THE MATTER OF NORTON SIMON, INC., A CORPORATION; AND CANADA DRY CORPORATION, A CORPORATION.

#### COMPLAINT

The Federal Trade Commission, having reason to believe that Norton Simon, Inc. and its wholly-owned subsidiary, Canada Dry Corporation, each hereby made and sometimes hereinafter referred to as respondent(s), or as Norton Simon or Canada Dry, have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph 1: For the purposes of this complaint, the following definitions

shall apply

(a) Bottler—any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;
(b) Central warehousing—a method of distribution in which soft drink prod-

ucts are received at a storage facility and either resold or delivered to retail

outlets or wholesalers;

(c) Concentrate—the basic soft dring ingredient sold to bottlers by respondents, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make postmix and pre-mix syrups:

(d) Consignment—a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is

indistinguishable from a salesman or agent;

(e) Place of business-the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce

600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a premix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) Soft drink products -nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through

pre-mix and post-mix systems or the like.

Paragraph Two: Respondent Norton Simon is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 230 Park Avenue, New York, New York 10017, Respondent Norton Simon had sales of \$1,046,031,000 in 1970 and of \$984,428,000 in 1969. Assets totaled \$734,545,000 in 1969.

Respondent Canada Dry, since 1968 a wholly-owned subsidiary of Norton Simon, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at 100 Park Avenue, New York, New York, Respondent Canada Dry was incorporated in the State of Delaware on June 30. 1969, Respondent Canada Dry is the successor to the concentrate and soft drink business of an earlier corporation which was incorporated in the State of Delaware on May 13, 1968, as the Nadaca Beverage Corporation; such name being changed to Canada Dry Corporation on July 17, 1968. The Nadaca Beverage Corporation was the successor to all business of another Canada Dry Corporation which was incorporated in the State of Delaware on June 1, 1925. Whenever activities, undertakings, arrangements or agreements of respondent Canada Dry are alleged to have occurred prior to June 30, 1969, it shall refer to the appropriate predecessor corporation during the applicable period. In 1969, Respondent Canada Dry had sales of approximately \$7,300,000 for soft drink concentrate to over 190 licensed bottlers located in every state of the United States. Total soft drink sales by Canada Dry were \$108,200,000 in 1969.

Paragraph Three: Respondent Norton Simon through various subsidiaries, is engaged in diverse business, such as the sale of soft drink products and concentrate, and distilled spirits (Canada Dry), food and food service (Hunt Foods & Industries, Inc.), packaging systems (United Can Co., and Glass Containers Corp.), and communications (McCall Publishing Co., and Saturday Review, Inc.). In 1969 sales by respondent Canada Dry (including distilled spirits sales) accounted for approximately 20% of total sales by Norton Simon. In 1967, prior to its acquisition by Norton Simon, Canada Dry had net sales in excess

of \$175,000,000.

Respondent Canada Dry is engaged principally in the manufacture and sale of concentrate which it sells to its over 190 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brand ginger ale, club soda, colins mixer, quinine water, bitter lemon, and various flavored beverages including root beer, orange, grape, lemon-lime, black cherry, and strawberry. Canada Dry bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its bottlers, Canada Dry operates bottling plants in several areas of the United States and sells soft drink products to retailers.

Paragraph Four: Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that Norton Simon, through its wholly-owned subsidiary, Canada Dry, causes a continuous flow of interstate commerce in soft drink products and concentrate to exist between Canada Dry headquarters and production facilities and the numerous bottlers

located throughout the United States which purchase their products.

Paragraph Five: In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing,

distribution and sale of soft drink products in commerce.

Paragraph Six: Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondents and their bottlers. A typical agreement between respondent Canada Dry and its bottlers provides that:

"Article 1. License and Territory. Canada Dry hereby grants the Bottler and the Bottler hereby accepts from Canada Dry an exclusive license to manufacture, bottle, sell and distribute the "CANDA DRY" beverages referred to below in the following territory only. . . ."

or provides that:

"The Bottler agree that it will not manufacture, bottle, sell or distribute, directly or indirectly . . . carbonated beverages under the trade names or trademarks of Canada Dry elsewhere than in the territory hereinabove described."

Canada Dry also sells soft drink products to bottlers (as that term is defined heretofore) in bottles and cans pursuant to an agreement which typically provides that:

"In as much as a portion of the State of Texas is served by franchised Bottlers, we ask that you do not, under any circumstances, make deliveries of Canada Dry merchandise into the following areas:"

[The territory is described.]

Paragraph Seven: The aforesaid agreements used by respondents have had,

and may continue to have, the following effects:

(a) Competition between and among respondent Canada Dry bottlers in the distribution and sale of "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products has been eliminated;

(b) Competition between and among Canada Dry's bottling operations and its bottlers in the distribution and sale of Canada Dry soft drink products at

the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products from the bottler of their choice at a competitive price; and

(d) Consumers of "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive

prices.

Paragraph Eight: Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products: deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 3rd day of March 1972, issues its complaint against said

respondents.

### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 24th day of April A.D. 1972, at 10 a.m., o'clock is hereby fixed as the time and Federal Trade Commission Offices, 11th & Penna. Ave., N.W., Washington, D.C., as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have

been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision contain-

ing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed that the proposed order provisions as to respondents might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

ORDER

Ι

IT IS ORDERED that respondents Norton Simon, Inc. and its wholly-owned subsidiary, Canada Dry Corporation, and the officers, agents, representatives, employees, successors and assigns, of each respondent, directly or through any corporate or other device, in connection with the advertising, merchandising, offering for sale and sale or distribution of soft drink products, concentrate, pre-mix syrup or post-mix syrup, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in

any act, practice or conduct having like or simliar purpose or effect.

2. Imposing or attempting to impose any limitations or restrictions respecting: (a) the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell premix or post-mix syrups, or soft drink products; (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any act, practice or conduct having like or similar purpose or effect.

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are sold; or in any way penalizing any bottler because of the: (a) territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups: (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sales to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, or imposing or attempting to impose any requirement, that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or

attempts to sell, soft drink products, or pre-mix or post-mix syrups.

ΙĮ

IT IS FURTHER ORDERED that respondent Norton Simon, Inc. shall within sixty (60) days after service upon it of this order serve upon all bottlers of respondent Canada Dry Corporation soft drink products a copy of this order along with a copy of the attached letter on Norton Simon, Inc. official company stationery and signed by the president of each respondent.

III

IT IS FURTHER ORDERED that the respondent Norton Simon, Inc. shall forthwith distribute a copy of this order to each of its subsidiaries.

IV

IT IS FURTHER ORDERED that respondent Norton Simon, Inc. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that each respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied

with this order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 3rd day of March, A.D., 1972.

By the Commission.

[SEAL]

CHARLES A. TOBIN, Secretary.

# [Official Norton Simon, Inc., Stationery]

(Date).

Norton Simon, Inc., and Canada Dry Corporation are also prohibited from refusing to sell or threatening to refuse to sell to any bottler anything used in the manufacture and sale of soft drink products. Furthermore, Norton Simon, Inc., and Canada Dry Corporation are prohibited from requiring or requesting any bottler to, in any manner, inform them of the territories in which, or the person or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or attempts to sell, soft drink products, or pre-mix or post-mix syrups. A copy of the order is attached.

The Federal Trade Commission has expressed its intention to determine the effect upon the marketing of soft drink products caused by the attached order by ascertaining at some future date the extent to which sales of soft drink products by bottlers extend to customers outside of previously established, but now prohib-

ited, territorial restrictions.

Very truly yours,

### UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

#### (Docket No. 8877)

IN THE MATTER OF NORTON SIMON, INC., A CORPORATION; AND CANADA DRY CORPORATION, A CORPORATION

#### Answer of Canada Dry Corporation

Canada Dry Corporation ("Canada Dry"), by its undersigned attorneys, hereby

answers the Complaint as follows:

1. With respect to the initial unnumbered paragraph, Canada Dry denies that it has violated Section 5 of the Federal Trade Commission Act, denies that the Commission has reason to believe that Canada Dry has violated Section 5 of the Federal Trade Commission Act, and denies that this proceeding is in the public interest.

2. Canada Dry admits that Paragraph One purports to set forth certain definitions to be used in construction of the Complaint, but Canada Dry denies that it is bound by any of said definitions and denies that these terms necessarily correspond with actual fact or with their general meaning in the soft drink industry, except that Canada Dry admits, for purposes of this proceeding, that the term "place of business" specifically excludes the plant at which a bottler combines concentrate with water, and possibly other ingredients for the packaging of soft drink products.

3. Canada Dry admits the allegations of the second paragraph of Paragraph Two of the Complaint, except that Canada Dry avers that, in 1969, its soft drink

concentrate sales were made to over 150 licensed bottlers,

4. Canada Dry admits the allegations of the second paragraph of Paragraph Three of the Complaint, except that Canada Dry avers that it sells concentrate to its over 150 bottlers. Canada Dry admits that in 1967, it had net sales in excess of \$175,000,000.

5. Canada Dry denies the allegations of Paragraph Four of the Complaint, except that Canada Dry admits, for purposes of this proceeding, that Canada Dry is engaged in "commerce" within the meaning of the Federal Trade Commission Act

(15 U.S.C. 44).

6. Canada Dry denies the allegations of Paragraph Five of the Complaint, except that Canada Dry admits, for purposes of this proceeding, that Canada Dry is now in competition with others engaged in the manufacture, processing, dis-

tribution and sale of soft drink products in commerce.

7. Canada Dry denies the allegations of Paragraph Six of the Complaint, except that Canada Dry admits that it has entered into agreements and that some of these agreements contain language similar to that set forth in the third sentence of Paragraph Six.

8. Canada Dry denies the allegations of Paragraph Seven of the Complaint.

9. Canada Dry denies the allegations of Paragraph Eight of the Complaint.

#### DEFENSES

10. Canada Dry alleges, as a defense to the Complaint, that provisions such as those referred to in the third sentence of Paragraph Six of the Complaint are lawful as reasonable and necessary to the protection of Canada Dry's trademarks.

11. Canada Dry alleges, as a defense to the Complaint, that the Complaint fails

to join as indispensable parties Canada Dry's soft drink bottlers.

12. Canada Dry alleges, as a defense to the Complaint, that this proceeding, to the extent directed toward modification of existing contracts between Canada Dry and others, would impose a penalty or forfeiture and is barred by the applicable Statute of Limitations, 28 U.S.C. § 2462.

13. Canada Dry alleges, as a defense to the Complaint, that this proceeding is

barred by laches and applicable principles of equity.

14. Canada Dry alleges, as defense to the Complaint, that this proceeding is contrary to the public interest.

15. Canada Dry alleges, as a defense to the Complaint, that the matters set forth in said Complaint fail to state a claim upon which relief can be granted. Wherefore, Canada Dry requests that the Complaint herein be dismissed.

Respectfully submitted.

BIERBOWER & ROCKEFELLER,
ALAN M. FREY.

1625 K Street NW., Washington, D.C.
CANADA DRY CORPORATION,
EDWIN S. WILKINS, Esq.,
100 Park Avenue, New York, N.Y., Of Counsel.

April 10, 1972.

#### CERTIFICATE OF SERVICE

I certify that on the 10th day of April, 1972, copies of the foregoing Answer were served upon complaint counsel by mailing said Answer to Robert B. Lee, Esquire, and David I. Wilson, Esquire, Federal Trade Commission, Washington, D.C.

ALAN M. FREY.

#### UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8877)

IN THE MATTER OF NORTON SIMON, INC., A CORPORATION; AND CANADA DRY CORPORATION, A CORPORATION

Answer of Norton Simon, Inc.

Norton Simon, Inc. ("NSI"), by its undersigned attorneys, hereby answers the Complaint as follows:

1. With respect to the initial unnumbered paragraph, NSI denies that it has violated Section 5 of the Federal Trade Commission Act, denies that the Com-

mission has reason to believe that NSI has violated Section 5 of the Federal Trade Commission Act, denies that this proceeding is in the public interest, and denies that NSI is an appropriate party to this Complaint or to this proceeding.

2. NSI admits that Paragraph 1 purports to set forth certain definitions to be used in construction of the Complaint, but NSI denies that it is bound by any of said definitions, and further denies that these terms necessarily correspond with actual fact or with their general meaning in the soft drink industry.

3. NSI admits the allegations of the first paragraph of Paragraph Two of the Complaint, except that NSI avers that it had sales of \$1,059,679,000 in

fiscal 1970.

4. NSI denies the allegations of the first paragraph of Paragraph Three of the Complaint but avers that it is the sole shareholder of several corporations, including Canada Dry Corporation.

5. NSI denies the allegations of Paragraph Four of the Complaint.
6. NSI denies the allegations of Paragraph Five of the Complaint.
7. NSI denies the allegations of Paragraph Six of the Complaint.
8. NSI denies the allegations of Paragraph Seven of the Complaint.

9. NSI denies the allegations of Paragraph Eight of the Complaint.
10. NSI denies that it is an appropriate party to this proceeding or this Complaint, but, if NSI is held to be an appropriate party, NSI claims all defenses available to Canada Dry Corporation.

Wherefore, NSI requests that the Complaint herein be dismissed.

Respectfully submitted.

EDWIN S. ROCKEFELLER, BIERBOWER & ROCKEFELLER, 1625 K Street NW., Washington, D.C.

APRIL 10, 1972.

## CERTIFICATE OF SERVICE

I certify that on the 10th day of April, 1972, copies of the foregoing Answer were served upon complaint counsel by mailing said Answer to Robert B. Lee, Esquire, and David I. Wilson, Esquire, Federal Trade Commission, Washington, D.C.

EDWIN S. ROCKEFELLER.

#### UNITED STATES OF AMERICA

#### BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8858)

# In the Matter of THE ROYAL CROWN COLA CO., a corporation

# COMPLAINT

The Federal Trade Commission, having reason to believe that The Royal Crown Cola Co., hereby made and sometimes hereinafter referred to as respondent, or Royal Crown, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint,

Paragraph One: For the purposes of this complaint, the following definitions

shall apply

(a) Bottler—any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale:

(b) Central warehousing—a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail

outlets or wholesalers;

(c) Concentrate—the basic soft drink ingredient sold to bottlers by respondent, usually as a syrup, and which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) Consignment—a form of distribution in which the consignor retains title. dominion, bears all risks of loss and delivers his products to the consignee who

is indistinguishable from a salesman or agent;

(e) Place of business—the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one-ounce of syrup from a tank, usually having about a five-gallon capacity and mixes it at the point of sale with five-ounces of carbonated water to produce approximately 600 six-ounce finished soft drink

servings per tank:

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a premix system differs from a post-mix system in that it draws from a tank, usually having about a five-gallon capacity, a finished serving of soft drink product containing both syrup and carbonated water, "pre-mixed," to produce 100 sixounce soft drink servings per tank; and

(h) Soft drink products-nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through pre-

mix and post-mix systems or the like.

Paragraph Two: Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1000 10th Avenue, Box 1440, Columbus, Georgia 31902. Respondent had sales of \$80,059,394 and assets of \$23,873,489 in 1969. In 1968, Royal Crown Cola made sales to over 333

domestic bottlers located in every state of the United States.

Paragraph Three: Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 333 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade." Royal Crown bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition, to manufacturing and selling concentrate to its bottlers, it operates bottling plants in seven areas of the United States and sells soft drink products to retailers.

Paragraph Four: Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its headquarters and production facilities located in Columbus, Georgia, and the numerous bottlers located throughout the United States which purchase

its products.

Paragraph Five: In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution

and sale of concentrate and soft drink products in commerce.

Paragraph Six: Royal Crown has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its franchised bottlers. A typical agreement between respondent and its bottlers provides that "The license of the bottler to sell Royal Crown beverages and to use the company's Royal Crown trademark is limited to the described territory, and the bottler shall not sell Royal Crown beverages to any person for resale without the limits of said territory."

Paragraph Seven: The aforesaid agreements used by respondent have had,

and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak." "Kick," "Lift" and "Gatorade" brands of soft drink products have been eliminated;

(b) Competition between and among Royal Crown's bottling operations and its bottlers in the distribution and sale of Royal Crown soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade" brands of soft drink products from the bottler of their choice at a competitive price; and

(d) Consumers of "Royal Crown." "Diet Rite." "Nehi," "Par-T-Pak." "Kick." "Lift" and "Gatorade" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at com-

petitive prices.

Paragraph Eight: Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products, deprive, and may continue to deprive, the public of the benefits of competition in the purchase of pre-mix, post-mix and soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Wherefore, the premises considered, the Federal Trade Commission on this

15th day of July 1971, issues its complaint against said respondent.

### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of September A.D. 1971, at 10 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Pennsylvania Avenue, N.W., Washington, D.C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have

been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing

such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to respondent might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

# ORDER

It is ordered, That the Royal Crown Cola Company, and the officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the advertising, merchandising, offering for sale and sale or distribution of soft drink products, concentrate, pre-mix syrup or post-mix syrup, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but no limited to central warehousing customers) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in any act, practice or conduct having like or similar purpose or effect.

2. Imposing or attempting to impose any limitations or restrictions respecting; of the: (a) territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell premix or post-mix syrups, or soft drink products; (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any act, practice or conduct having like or similar purpose or effect,

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are sold; or in any way penalizing any bottler because of the: (a) territory in which, or the persons or class of nersons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups; (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sale to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, or imposing or attempting to impose any requirement that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bettler sells, or attempts

to sell, soft drink products, or pre-mix or post-mix syrups.

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It is further ordered. That respondent shall within sixty (60) days after service upon it of this order serve upon all bottlers of its soft drink products a copy of this order along with a copy of the attached letter on respondent's official company stationery and signed by the president of respondent.

HI

It is further ordered. That respondent shall fortbwith distribute a copy of this order to each of its subsidiaries and operating divisions.

τv

It is further ordered, That respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered. That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

In witness whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 15th day of July, A.D., 1971.

By the Commission.

[SEAL]

CHARLES A. TOBIN,
Secretary.

# UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION (Docket No. 8858)

IN THE MATTER OF THE ROYAL CROWN COLA COMPANY, A CORPORATION Answer to Complaint

Without admitting the Commission's jurisdiction in this cause, and without waiving any of its legal rights, respondent, Royal Crown Cola Co. (hereafter "Royal Crown"), denies that it has violated the provisions of the Federal Trade Commission Act, denies that this proceeding is in the public interest, denies that its name is The Royal Crown Cola Company, avers that this action is barred by applicable principles of equity, laches and by the applicable statute of limitations, and files the following answer to the complaint by the Federal Trade Commission in the above-captioned proceeding.

1. Respondent admits that the Federal Trade Commission's complaint has defined the terms as set forth in Paragraph One, but denies that these terms necessarily correspond with actual fact or their general meaning in the industry.

2. Respondent admits the allegation of the first and second sentences of Paragraph Two. Respondent denies the allegations of the third sentence of Paragraph Two, and avers that it had sales of \$92,750,627 during calendar year 1969 and assets of \$22,929,741 as of December 31, 1969. Respondent denies the allegations of the fourth sentence of Paragraph Two, and avers that it supplied concentrate to approximately 300 domestic bottlers in 1968.

3. Respondent admits the allegations of the first sentence of Paragraph Three. Respondent denies the allegations of the second sentence of Paragraph Three. except that it admits that Royal Crown bottlers process concentrate with other ingredients to make soft drink products or pre-mix and post-mix syrup and package these products in containers for sale. Respondent denies the allegations of the

third sentence of Paragraph Three.

4. Respondent denies the allegations of Paragraph Four, but it does not contest for the purpose of this proceeding that it is engaged in commerce within the

meaning of the Federal Trade Commission Act (15 U.S.C. § 44).

5. Respondent denies the allegations of Paragraph Five, except that it admits that in the course and conduct of its business respondent, its subsidiaries, or licensees have been and are now in competition with others engaged in the manufacture, processing, distribution or sale of concentrate or soft drink products in commerce.

6. Respondent denies the allegations of Paragraph Six, except that respondent avers that it has from time to time granted liecuses to others for the sale of products under Royal Crown trademarks, and refers to such licenses for the complete terms thereof. Respondent further avers that the provisions of these licenses are reasonably ancillary to the licensing of respondent's trademarks and increase competition in the advertising, merchandising, distribution, offering for sale, and sale of such pre-mix and post-mix syrup and soft drink products.

7. Respondent denies the allegations of Paragraph Seven. 8. Respondent denies the allegations of Paragraph Eight.

Wherefore, respondent requests the complaint be dismissed as unwarranted in law and contrary to the public interest.

Respectfully submitted.

FREDERICK M. ROWE, JAMES H. WALLACE, Jr., KIRKLAND, ELLIS, HODSON, CHAFFETZ, MASTERS & ROWE,

1776 K Street NW., Washington, D.C., Attorneys for Respondent. NOLAN MURRAH, Jr.,

1000 Tenth Avenue, Columbus, Ga., Of Counsel.

September 10, 1971.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION (Docket No. 8856)

IN THE MATTER OF PEPSICO, INC., A CORPORATION

# COMPLAINT

The Federal Trade Commission, having reason to believe that PepsiCo, Inc., hereby made and sometimes hereinafter referred to as respondent, or PepsiCo, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it

in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1: For the purposes of this complaint, the following definitions

shall apply:

(a) Bottler—any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or postmix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central warehousing—a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail

outlets or wholesalers:

(c) Concentrate—the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) Consignment—a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who

is indistinguishable from a salesman or agent;

(e) Place of business—the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce

600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a premix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) Soft drink products-nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through

pre-mix or post-mix systems or the like.

Paragraph Two: Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, New York 10577. Respondent had sales of \$848,265,196 and assets of \$471,915,996 in 1969. In 1968, PepsiCo made domestic sales to over

500 bottlers located in every state of the United States.

Paragraph Three: Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 500 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio." PepsiCo bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its bottlers, PepsiCo operates bottling plants in 25 areas of the United States and sells soft drink products to retailers.

Paragraph Four: Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its headquarters and production facilities and the numerous bottlers located

throughout the United States which purchase their products.

Paragraph Five: In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution

and sale of soft drink products in commerce.

Paragraph Six: PepsiCo has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the

agreements between respondent and its bottlers. A typical agreement between respondent and its bottlers provides that the bottler is permitted "to bottle and distribute the carbonated beverage (herein called the 'Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the 'Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows: . . ."

Paragraph Seven: The aforesaid agreements used by respondent have had, and

may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products has been eliminated;

(b) Competition between and among PepsiCo's bottling operations and its bottlers in the distribution and sale of PepsiCo soft drink products at the whole-

sale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drinks products from the bottler of their choice at a competitive price; and

(d) Consumers of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive

prices.

Paragraph Eight: Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Wheretofore, the premises considered, the Federal Trade Commission on this

15th day of July, 1971, issues its complaint against said respondent.

### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of September, A.D. 1971, at 10 a.m., o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Penna. Avenue, N.W., Washington, D.C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been

admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proeccding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Pailure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision

containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to respondent might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

#### ORDER.

Ι

It is ordered. That respondent PereiCo, Inc., its officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the advertising, merchandise, offering for sale and sale or distribution or soft drink products, concentrate, pre-mix or post-mix syrups, in commerce, as "commerce" is defined in the Federal Trade Commission

Act, do forthwith cease and desist from directly or indirectly:

1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in any act, practice or conduct having like or similar purpose or effect.

2. Imposing or attempting to impose any limitations or restrictions respecting:
(a) the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell premix or post-mix syrups, or soft drink products; (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any act, practice or conduct having like or similar purpose of effect.

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are soid; or in any way penalizing any bottler because of the: (a) territory in which, or (ne persons or class of persons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups; (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sales to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, or imposing or attempting to impose any requirement, that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bottler sells, or

attempts to sell, soft drink products, or pre-mix or post-mix syrups.

ΙI

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order serve upon all bottlers of its soft drink products a copy of this order along with a copy of the attached letter on respondent's official company stationery and signed by the president of respondent.

TIT

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its subsidiaries and operating divisions.

IV

It is furthered ordered, That respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this

order.

In witness whereof, the Federal Trade Commission has caused this its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 15th day of July, A.D., 1971.

By the Commission.

[SEAL]

CHARLES A. TOBIN, Secretary.

UNITED STATES OF AMERICA

REFORE FEDERAL TRADE COMMISSION

(Docket No. 8856)

IN THE MATTER OF PEPSICO, INC., A CORPORATION RESPONDENT'S ANSWER TO COMPLAINT

Respondent, PepsiCo, Inc., for its answer to the complaint herein alleges:

ANSWERING THE FIRST UNNUMBERED PARAGRAPH OF THE COMPLAINT

Respondent denies:

(a) that it has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45);

(b) that the Federal Trade Commission has reason to believe that respondent

has violated said statute; and

(c) that this proceeding would be in the public interest.

1. Answering paragraph one of the complaint:

Respondent admits that the complaint purports to use the terms set forth in Paragraph One as defined therein and, with respect to the definitions contained

in subparagraphs (a) through (h) thereof:

(a) Denies each and every allegation of subparagraph (a), but admits that a "bottler" might be defined for the purposes of the complaint as any individual, partnership, corporation, association or other business or legal entity which purchases concentrate for use in the manufacture and sale of soft drink products. (b) Denies each and every allegation of subparagraph (b).

(c) Denies each and every allegation of subparagraph (c), but admits that "concentrate" is a basic soft drink ingredient in concentrated form sold by pro-

ducers thereof for use in the manufacture of soft drink products.

(d) Denies knowledge or information sufficient to form a belief concerning the

allegations of subparagraph (d).

(e) Denies each and every allegation of subparagraph (e), but admits that, for purposes of this proceeding and as used in the complaint and proposed order, the term "place of business" excludes the plants at which bottlers manufacture,

can and/or bottle and package soft drink products.

(f) With respect to the first sentence of subparagraph (f), denies each and every allegation thereof, except admits that "post-mix syrup" might be defined for purposes of the complaint as a finished syrup used in fountain dispensing and vending equipment to make soft drink products. Respondent admits the allegations of the second sentence of subparagraph (f), with the qualification that a typical post-mix system produces approximately 600 six-ounce soft drink servings per five-gallon tank.

(g) Denies each and every allegation of subparagraph (g), except admits that a "pre-mix system" might be defined for the purposes of the complaint as a system which draws from a five-gallon tank approximately 100 six-ounce soft

drink servings per tank.

- (h) Denies each and every allegation of subparagraph (h), but admits that "soft drink products" are nonalcoholic beverages which may be carbonated or uncarbonated.
  - 2. Answering paragraph two of the complaint:

(a) Respondent admits the allegations of the first two sentences of Paragraph

Two of the Complaint.

(b) With respect to the third sentence of Paragraph Two, respondent admits that it had consolidated sales of \$848,265,196 and consolidated assets, including non-soft drink and foreign sales and assets, of \$471,915,996, except that such amounts apply to the year 1968 rather than 1969.

(c) Respondent admits the allegations of the fourth sentence of Paragraph Two, with the qualification that its domestic sales were made to approximately

500 bottlers in 1968.

3. Answering Paragraph Three of the Complaint:

Respondent denies each and every allegation thereof, except:

(a) With respect to the first sentence of Paragraph Three, respondent admits that it is engaged through its Pepsi-Cola Company division in the manufacture and sale of concentrates and syrups which it sells to approximately 500 bottlers in the United States who purchase such concentrates or syrups under the terms of exclusive bottling appointment agreements licensing such bottlers to manufacture and sell soft drink products under respondent's celebrated trademarks such as "Pepsi-Cola," "Pepsi," "Diet Pepsi-Cola," "Mountain Dew," "Teems" and "Patio."

(b) With respect to the second sentence of Paragraph Three, respondent admits that the bottlers referred to in (a) above manufacture, can and/or bottle and package the soft drink products sold under respondent's trademarks.

(c) With respect to the third sentence of Paragraph Three, respondent admits that subsidiaries of PepsiCo, Inc. operate approximately 20 bottling plants in various parts of the United States and sell the products of such plants.

4. Answering Paragraph Four of the Complaint:

Respondent denies each and every allegation thereof, except admits that it is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44).

5. Answering Paragraph Five of the Complaint:

Respondent denies each and every allegation thereof, except admits that it has been and is now in competition with others engaged in the manufacture, processing, distribution and sale of concentrates, syrups or soft drink products in commerce.

6. Answering Paragraph Six of the Complaint:

Respondent denies each and every allegation thereof, except admits that a typical exclusive bottling appointment agreement of respondent provides among other things that the bottler is appointed as respondent's "exclusive bottler, to bottle and distribute the carbonated beverage (herein called the Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows:..." and refers to said agreement for the complete terms thereof.

7. Answering Paragraph Seven of the Complaint, Including Subparagraphs

(a) Through (d) thereof:

Respondent denies each and every allegation thereof.
8. Answering Paragraph Eight of the Complaint:
Respondent denies each and every allegation thereof.

9. Further Answering the Complaint:

(a) Respondent alleges, as a complete defense thereto, that the exclusive bottling appointment agreements of respondent with bottlers are valid exclusive representation agreements creating, as an integral part of trademark licenses granted therein, lawful ancillary restraints which are essential, fair and reasonable in terms, among other things, of the investment in plant, manufacturing and distribution facilities required of frunchised bottlers and the necessity for respondent to exercise control over the use of its trademarks by licensees of those marks in order to protect its valuable trademark rights, and are not in violation of Section 5 of the Federal Trade Commission Act.

(b) Respondent alleges further, as a complete defense thereto, that the complaint herein is fatally defective in that it fails to join as parties respondent persons needed for a just adjudication, to wit the soft drink bottlers who have entered into the challenged agreements with respondent and made substantial

investments in plant, manufacturing and distribution facilities in reliance thereon and upon the territorial security afforded them thereunder, and ignores the projectly and procedural rights of these indispensable parties whose economic interests would be most directly and adversely affected by the proposed order accompanying the complaint. A full and fair adjudication of the issues raised by the complaint cannot be had without the participation of the bottlers herein and, unless they are joined in this proceeding, respondent is gravely prejudiced should any proceeding or disposition thereof not bind all parties to the challenged agreements.

(c) Respondent alleges further, as a complete defense thereto, that the com-

plaint is barred by laches and by the applicable statute of limitations.

(d) Respondent alleges further, as a complete defense thereto, that the complaint fails to state a claim against respondent upon which relief can be granted. WHEREFORE, respondent asks that the complaint herein be dismissed with prejudice.

MILTON HANDLER, Attorney for Respondent.

Of Counsel:

Fred A. Freund, Esq., Elizabeth Head, Esq., James G. Frangos, Esq. New York, N.Y., August 23, 1971.

# UNITED STATES OF AMERICA

### BEFORE FEDERAL TRADE COMMISSION

# (Docket No. 8855)

IN THE MATTER OF THE COCA-COLA CO., A CORPORATION: COCA-COLA BOTTLING CO. (THOMAS), INC., A CORPORATION; COCA-COLA BOTTLING WORKS (THOMAS), INC., A CORPORATION; AND COCA-COLA BOTTLING WORKS 3RD, INC., A CORPORATION

#### COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof, each of which is hereby made and is sometimes hereinafter referred to as respondent(s), have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in this respect as follows:

Paragraph one.—For the purposes of this complaint, the following definitions

shall apply:

(a) Bottler—any individual, partnership, corporation, association, or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale:

(b) Central warehousing—a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail

outlets or wholesalers;

(c) Concentrate—the basic soft drink ingredient sold to bottlers by respondent, usually as a syrup, and which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) Consignment—a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who

is indistinguishable from a salesman or agent;

(e) Place of business—the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business head-quarters, branch sa'es offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products:

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a tank, usually having

about a five-gallon capacity, and mixes it at the point of sale with five ounces of carbonated water to produce approximately 600 six-ounce finished soft drink

servings per tank ;

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a premix system differs from a post-mix system in that it draws from a tank, usually having about a five-gallon capacity, a finished serving of soft drink product containing both syrup and carbonated water, "pre-mixed," to produce 100 sixounce soft drink servings per tank; and

(h) Soft drink products—nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through

pre-mix and post-mix systems or the like.

Paragraph two.—Respondent The Coca-Cola Company, sometimes hereinafter referred to as Coca-Cola, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 310 North Avenue, N.W., Atlanta, Georgia 30313. The Coca-Cola Company and subsidiaries had net sales of \$1,185,-808,864 (approximately 45% of which is accountable to foreign operations), and assess of 8802,100,548 in 1968. In 1968 (ecca-C) at made sales to over 900domestic bottlers located throughout the United States.

Respondent Coca-Cola Bottling Co. (Thomas), Inc., sometimes hereinafter referred to as Thomas Company, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building. Chattanooga, Tennessee 37402. In 1968, Thomas Company made sales to over 196 bottlers located principally in Indiana, Maryland, Mississippi, New Jersey, New York, Ohio, Pennsylvania, Virginia and West Virginia.

Respondent Coca-Cola Bottling Works (Thomas), Inc., sometimes hereinafter referred to as Thomas Works, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee \$7402. In 1968, Thomas Works made sales to over 65 bottlers located principally in the States of Kentucky and Tennessee.

Respondent Coca-Cola Bottling Works 3rd, Inc., sometimes hereinafter referred to as Works 3rd, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee 37402. In 1968, Works 3rd made sales to over 25 bottlers

located principally in the States of Pennsylvania and New Jersey.

Paragraph three.—Respondent Coca-Cola, through its Coca-Cola U.S.A. division, is engaged principally in the manufacture and sale of soft drink products and concentrate which it sells to over 900 bottlers who purchase the concentrate under a license to produce and sell soft drink products under such trade names of respondent Coca-Cola as "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba." Bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale is soft drink products to retailers. In addition to manufacturing and selling soft drink products and concentrate to its bottlers, Coca-Cola operates bottling plants in 27 areas of the United States and sells soft drink products to retailers.

Respondent Thomas Company has operated for many years as a parent bottler under an agreement with Coca-Cola by which Thomas Company was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Thomas Company is engaged principally in the purchase of concentrate from Coca-Cola for resale by Thomas Company to numerous bottlers which have obtained licenses from it to bottle and

resell certain specified tradename soft drink products of Coca-Cola.

Respondent Thomas Works has operated for many years as a parent bottler under an agreement with Coca-Cola by which Thomas Works was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Thomas Works is engaged principally in the purchase of concentrate from Coca-Cola for resale by Thomas Company to numerous bottlers which have obtained licenses from it to bottle and resell certain specified tradename soft drink products of Coca-Cola.

Respondent Works 3rd has operated for many years as a parent bottler under an agreement with Coca-Cola by which Works 3rd was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Works 3rd is engaged principally in the purchase of concentrate from Coca-Cola for resale by Works 3rd to numerous bottlers which have obtained licenses from it to bottle and resell certain specified

trade name soft drink products of Coca-Cola.

Paragraph four.—Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between their headquarters and production facilities and the numerous bottlers located throughout the United States which purchase their products.

Paragraph fire.—In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of concentrate and soft drink products in commerce.

Paragraph six.—Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreement between respondents and their bottlers.

A typical license between respondent Coca-Cola and its bottlers provides that

as to a specifically described geographic territory:

. . . COMPANY agrees to furnish to BOTTLER, and only to furnish for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of BOTTLER in the territory herein described.

... COMPANY does hereby select BOTTLER as its sole and exclusive customer and licensee for the purpose of bottling the Bottlers' bottle syrup,

COCA-COLA, in the territory described.

[BOTTLER agrees] . . . not to use trade-marks COCA-COLA or COKE, nor bottle nor vend said product except in the territory herein referred to. This limitation, however, is not to prevent BOTTLER from acquiring similar rights for other territory.

[BOTTLER agrees] . . . not to use said distinctive [COCA-COLA] bottle for any other purpose than the bottling of COCA-COLA, and not in any

territory except as herein referred to.

A typical license between respondents Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas), Inc. and the bottlers of each provides in part that licensor, wishing to assign to the bottler certain rights as to a specifically described geographic territory which has been received by approved

transfer from The Coca-Cola Company, agrees:

... to obtain and furnish to party of the second part [bottler] and only to obtain, for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of party of the second part in the territory herein described, provided party of the first [licensor] can obtain the delivery to it of such syrup from The Coca-Cola Company under the contract existing between party of the first part and The Coca-Cola Company.

[To select bottler] . . . as its sole and exclusive customer and licensee for the purpose of bottling Bottlers' Coca-Cola syrup, and using the name Coca-

Cola thereon in the territory herein described.

In consideration therefor, bottler agrees:

... Not to use the name Coca-Cola nor bottle nor vend said product except in the territory herein referred to without the written consent of party of the first part and The Coca-Cola Company. This limitation, however, is not to prevent party to the second part from obtaining such rights from parties authorized to use the name Coca-Cola and to bottle and vend said product.

... To order, for the purpose of bottling Coca-Cola, the distinctive bottle, and none other, adopted or that may be adopted by party of the first part: to use said distinctive bottle and none other, in bottling Coca-Cola, and not to use said distinctive bottle for any other purpose than the bottling of Coca-Cola, and not in any territory except as herein referred to without the written consent of party to the first part and The Coca-Cola Company.

The license restrictions between Coca-Cola Bottling Works 3rd, Inc. and its bottlers are substantially similar to that of Coca-Cola. Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas) Inc. Coca-Cola Bottling Works (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. and their bottlers.

Paragraph seven.—The aforesaid agreements used by respondents have had,

and may continue to have, the following effects:

(a) Competition between and among respondents' bottlers in the distribution and sale of "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba" brands of soft drink products has been eliminated;

(b) Competition between and among Coca-Cola's bottling operations and its bottlers in the distribution and sale of Coca-Cola soft drink products at the

wholesale level has been eliminated;

(c) Competition between and among Coca-Cola's bottling operations and bottlers licensed by Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. in the sale and distribution of Coca-Cola's soft drink products at the wholesale level has been eliminated;

(d) Competition between and among bottlers licensed by Coca-Cola and bottlers licensed by Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. in the sale and distribution of Coca-Cola soft drink products at the wholesale level has been eliminated;

(e) Innumerable retailers and other customers have been deprived of the right to purchase "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba" brands of soft drink products from the bottler of their choice at

competitive prices; and

(f) Consumers of "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta," and "Simba" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive

prices.

Paragraph cight.—Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of pre-mix, post-mix and soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 15th day of July, 1971, issues its complaint against said

respondents.

### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of September, A.D. 1971, at 10 a.m., is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Penna. Avenue, N.W., Washington, D.C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing

such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to respondents might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

### ORDER

### Ι

IT IS ORDERED that The Coca-Cola Company; Coca-Cola Bottling Co. (Thomas), Inc.; Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc., and the officers, agents, representatives, employees, successors and assigns of each respondent, directly or through any corporate or other device, in connection with the advertising, neechandising, offering for sale and sale or distribution of soft drink products, concentrate, pre-mix syrup or post-mix syrup, in commerce, as "commerce" is defined in the Federal Trade Commission

Act, do forthwith cease and desist from directly or indirectly:

1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but not limited to central warehousing enstoners) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in any act, practice or conduct having like or similar purpose or effect.

2. Imposing or attempting to impose any limitations or restrictions respecting: (a) the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell premix or post-mix syrups, or soft drink products; (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any act, practice or conduct having like or similar purpose

or effect.

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are sold; or in any way penalizing any bottler because of the: (a) territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups: (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sales to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Aftempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, under standing or agreement, or imposing or attempting to impose any requirement, that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bottler sells,

or attempts to sell, soft drink products, or pre-mix or post-mix syrups.

#### H

IT IS FURTHER ORDERED, That respondents. The Coca-Cola Company, Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Cola-Coca Bottling Works 3rd, Inc., shall within sixty (60) days after service upon them of this order serve upon all bottlers of their soft drink products a copy of this order along with a copy of the attached letter on official company stationery and signed by the president of each respondent.

### III

IT IS FURTHER ORDERED, That the respondents, the Coca-Cola Company, Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc., shall forthwith distribute a copy of this order to each of their subsidiaries and operating divisions,

# IV

IT IS FURTHER ORDERED, That respondents, The Coca-Cola Company, Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc., notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of the order

IT IS FURTHER ORDERED, That each respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied

with this order

IN WITNESS WHEREOF, The Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 15th day of July, A.D., 1971.

By the Commission

[SEAL]

CHARLES A. TOBIN, Secretary.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Answer of the Coca-Cola Company

(Docket No. 8855)

IN THE MATTER OF THE COCA-COLA CO., A CORPORATION; COCA-COLA BOTTLING CO. (THOMAS), INC., A CORPORATION; COCA-COLA BOTTLING WORKS (THOMAS), INC., A CORPORATION; AND COCA-COLA BOTTLING WORKS 3RD, INC., A CORPORATION

Respondent The Coca-Cola Company by its attorneys, White & Case, for Answer to the Complaint against it herein:

1. Denies each and every unnumbered allegation preceding Paragraph One of the Complaint.

2. Denies each and every allegation of paragraph one of the complaint, except. 3. Admits that Respondent The Coca-Cola Company is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware, that it maintains an office and its principal place of business at 310 North Avenue, N.W., Atlanta, Georgia 30313, that it and its subsidiaries in 1968 had consolidated net sales of \$1,185,808,864 (approximately one third and more of which is accountable to foreign operations), and consolidated assets in 1968 of \$802,100,548, and that in 1968 it sold or shipped syrup or concentrates to approximately 900 domestic bottlers located throughout the United States; admits the allegations of the second, third and fourth paragraphs except as to the number of bottlers referred to therein; and except as herein expressly treated denies each and every allegation of paragraph two of the complaint.

4. Admits that Respondent The Coca-Cola Company through its Coca-Cola U.S.A. division is engaged principally in the manufacture and sale of syrup and concentrates for the processing and sale of soft drinks under one or more of the trade names of Respondent The Coca-Cola Company such as "Coca-Cola" ("Coke"), "TAB", "Sprite", "Fresca", "Fanta" and "Simba", that Respondent's contract bottlers using its syrups or concentrates and other ingredients pursuant to contract process and package soft drink products in bottles and cans for sale to retailers under such trade names, that it has subsidiaries which operate bottling plants in 26 cities of the United States and sell soft drink products to retailers in the areas thereof, that the Thomas companies have operated for many years as parent bottlers pursuant to bottling agreements with Respondent The Coca-Cola Company, that said companies were granted certain rights, subject

to the terms of said bottling agreements, with respect to the bottling and sale of Coca-Cola soft drink in certain designated territories, that said companies engage principally in the purchase of syrups from Respondent The Coca-Cola Company for sale to numerous bottlers to process and sell Coca-Cola in bottles and cans pursuant to bottling agreements; and except as herein expressly admitted denies each and every allegation of paragraph three of the complaint.

5. Admits that Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44); and except as herein expressly admitted denies each and every allegation of paragraph four of the

complaint.

6. Admits that Respondents or their subsidiaries have been and are now in active competition with other corporations, firms, partnerships or persons engaged in the manufacture, processing, distribution and sale of syrups, concentrates or soft drink products in commerce; and except as herein expressly admitted denies each and every allegation of paragraph five of the complaint.

7. Denies each and every allegation of paragraph six of the complaints except admits that it has contracts with bottlers and that it has consented to contracts between the several Thomas company respondents and bottlers, that said contracts include territorial provisions which are dependent upon and essential to the other covenants of said agreements, and refers to said agreements for the complete terms thereof.

8. Denies each and every allegation of Paragraphs Seven and Eight of the

complaint.

### AS AND FOR A FIRST AFFIRMATIVE DEFENSE

9. The alleged restraints of the contracts between Respondent The Coca-Cola Company and its bottlers have been declared by the United States District Court for the District of Delaware to be lawful and valid under federal and state antirust laws, including laws enforceable by the Federal Trade Commission, and, among other things, to be "at most...a partial and not...a general restraint" and "merely ancillary to the main purpose of a lawful contract." [not I having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly", and not containing "anything therein that may be said to be in unreasonable restraint of trade." The Coca-Cola Bottling Co. v. The Coca-Cola Co., 269 F. 796 (D. Del. 1920).

10. The Coca-Cola contracts challenged herein were included in, and entered as, the judgment of the United States District Court for the District of Delaware in the aforesaid action which judgment has never been rescinded, vacated or

modified.

11. To the extent that the instant proceeding seeks to alter, modify or otherwise affect the rights and obligations under said judgment of a United States District Court the Federal Trade Commission is without jurisdiction or authority.

### AS AND FOR A SECOND AFFIRMATIVE DEFENSE

12. Respondent repeats and realleges as if fully set forth herein the allegations

of paragraphs 9 through 11 hereof.

13. In attempting herein to declare unlawful and to invalidate provisions of contracts with third parties which have been judicially held to be valid and lawful transfers of "property rights" to said third parties and "perpetual" in nature, the Federal Trade Commission has failed to join indispensable parties, to wit: the bottlers who are the other parties to said contracts.

# AS AND FOR A THIRD AFFIRMATIVE DEFENSE

14. Respondent repeats and realleges as if fully set forth herein the allegations of paragraphs 9 through 11 and 13 hereof.

15. The rights and obligations of the bottler contracts are property rights, as has been declared by the aforesaid District Court more than fifty years ago.

16. The Federal Trade Commission is charged with enforcement of the laws under which the United States District Court decided the aforementioned case. The Commission should have been aware of said decision since the date it was rendered more than fifty years ago, and has been aware of it for more than five years prior to the issuance of the complaint herein.

17. This proceeding, to the extent that it seeks either to eliminate any of the aforesaid property rights, or similar relief, would impose a penalty of forfeiture

and is barred by the Statute of Limitations. 28 U.S.C. 2462.

# AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

18. Respondent repeats and realleges as if fully set forth herein the allegations of paragraphs 9 through 11, 13 and 15 through 17 hereof.

19. The bringing of this action, the relief demanded, and the effects of the institution of this action are and will be unfair and unreasonable and outside the

Commission's authority.

20. Among other things Respondent is subject to a judgment of the United States District Court for the District of Delaware incorporating the terms of the contracts in question. If the Commission should prevail in this proceeding, Respondent would be subjected to the peril of conflicting decrees on the same subject. Irrespective of the action it took, it would either be in contempt of Court and breach of a court ordered contract, or, in violation of the Commission's order.

21. The result of the Commission's action if it should prevail would be unfair

and anti-competitive.

22. Respondent's rights to due process of law under the Fifth Amendment to the Constitution of the United States are and will be violated.

# AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

23. Respondent repeats and realleges as if fully set forth herein the allegations of paragraphs 9 through 11 and 13, 15, 16, 17 and 19 through 22 hereof. 24. There is no public interest in this proceeding.

WHEREFORE, Respondent The Coca-Cola Company prays that the complaint

herein be dismissed in its entirety.

Respectfully submitted,

Of Counsel:

George M. Lawson, Thomas Kiernan, Mario Diaz-Cruz. WHITE & CASE

By Edward Wolfe,

A Member of the Firm.

14 Wall Street

New York, New York 10005

Attorneys for Respondent
The Coca-Cola Company

AUGUST 26, 1971.

# UNITED STATES OF AMERICA

# BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8855, Answers of Coca-Cola Bottling Co., (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., and Coca-Cola Bottling Works 3rd, Inc.)

IN THE MATTER OF THE COCA-COLA COMPANY, A CORPORATION; COCA-COLA BOTTLING CO. (THOMAS), INC., A CORPORATION; COCA-COLA BOTTLING WORKS (THOMAS), INC., A CORPORATION; AND COCA-COLA BOTTLING WORKS 3RD, INC., A CORPORATION

Respondents Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., and Coca-Cola Bottling Works 3rd, Inc. by their undersigned attorneys, for their Answers to the Complaint against them herein:

1. Deny the allegations of the unnumbered allegations preceding Paragraphs

One of the complaint.

2. Deny the allegations of Paragraph One of the complaint but admit the Commission intends to use the definitions therein for the purposes of this

proceeding.

3. Admit the allegations of Paragraph Two of the complaint, except that the 900 bottlers referred to in the first subparagraph include the bottlers referred to in the other subparagraphs of said Paragraph; as of June 1968 respondent Thomas Company had contracts with 122 first line bottlers, which bottlers were located in Alabama, Delaware, and North Carolina, as well as the states listed in the second subparagraph, and which first line bottlers had contracts with 45 sub bottlers; which were located in Illinois and Missouri as well as in the states listed in said subparagraph; as of June 1968 respondent Thomas Works had contracts with 38 first line bottlers, which bottlers were located in Alabama, Georgia, Kentucky and Tennessee, and which first line bottlers had contracts with 13 sub bottlers located in Alabama and Kentucky; and as of

June 1968 respondent Works 3rd had contracts with 5 first line bottlers in New

Jersey and Pennsylvania.

4. Admit that respondent Coca-Cola through its Coca-Cola U.S.A. division, is engaged principally in the manufacture and sale of syrup and concentrates for the processing and sale of soft drinks under one or more of the trade names of respondent Coca-Cola such as "Coca-Cola" ("Coke"), "TAB", "Sprite", "Fresca", "Fanta", and "Simba", that said respondent's bottlers, using its syrups and other ingredients, process and package soft drink products in bottles and cans for sale to retailers and consumers, that said respondent has certain subsidiaries which operate bottling plants in certain areas and sell soft drink products to retailers and consumers, and deny they have sufficient knowledge or information sufficient to form a belief as to the remaining allegations of the first subparagraph of Paragraph Three of the complaint; admit the allegations of the second, third and fourth subparagraphs of said Paragraph except these respondents sell no syrups, concentrate or beverages other than bottlers syrup for the processing of bottled Coca-Cola and B-X syrup for the processing of Coca-Cola pre-mix, respondents sell such syrups to bottlers who process bottled Coca-Cola and Coca-Cola pre-mix and sell said products to retailers and consumers pursuant to the contracts referred to in paragraph 7 of this Answer, and respondent Works 3rd operates under a contract with respondent Thomas Company, not with respondent Coca-Cola; and state that, pursuant to agreements with respondent Coca-Cola and pursuant to a decision of the United States District Court for the District of Delaware reported at 269 Fed. 796 (D. Del. 1920), these respondents have the absolute, unlimited and perpetual right to use the trade-mark name Coca-Cola, and all labels and designs pertaining thereto, in connection with the product bottled Coca-Cola in the territories in which respondents Thomas Company, Thomas Works, and Works 3rd, do business to the exclusion of all others, including respondent Coca-Cola.

5. Deny the allegations of Paragraph Four of the complaint except they admit all respondents in this proceeding are engaged in commerce within the meaning of

the Federal Trade Commission Act (15 USC § 44).

6. Deny the allegations of Paragraph Five of the complaint except they admit that respondents are in active and effective competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of syrup, concentrate and soft drink products in commerce.

7. Deny the allegations of Paragraph Six of the complaint except they admit they have contracts with their bottlers which restrict them from using the Coca-Cola trademark name or selling bottled soft drink products bearing the Coca-Cola trade-mark name outside the territories in which the bottler has been licensed to use the Coca-Cola trade-mark name or to bottle and sell soft drinks under the Coca-Cola trade-mark name. The restrictions appear in written contracts with the bottlers which convey to the bottlers the exclusive right to use the Coca-Cola trade-mark name in connection with bottled soft drink products in designated territories and to be the sole bottler and vendor of such products using the Coca-Cola trade-mark name in said territories. Among the terms included in such written contracts between respondents Thomas Company, Thomas Works and Works 3rd and their bottlers are the terms quoted in the third and fourth subparagraphs of Paragraph Six of the complaint. In addition, said contracts provide, among other things, that the respondent "hereby assigns to party of the second part (bottler) the sole and exclusive right and license that it received from The Coca-Cola Company to use and vend on Bottled Coca-Cola the trademark name Coca-Cola, and all labels and designs pertaining thereto, in connection with the product 'Bottled Coca-Cola' in the territory hereinbefore described . . . it being understood and agreed that the use herewith given shall be confined to the bottled product, the names, labels, etc., in connection with the fountain product having been reserved by The Coca-Cola Company."

In consideration the bottler, agrees, among other things:

"To invest in a plant and equipment, and to keep up said plant and equipment in such a condition as will be sufficient to meet satisfactorily the demands of the business in the territory herein referred to, and to increase such investment in said business as the demand for Coca-Cola in bottles in said territory may require."

"To allow party of the first part, and representatives designated by it, to enter and examine the premises where said Coca-Cola is bottled and prepared for market, and allow party of the first part, and such representatives, to make any necessary examinations, to see that the provisions of this contract are carried out fully."

"Failure of party of the second part to properly and vigorously push the sale of Bottled Coca-Cola shall be deemed a violation of this contract, and party of first part shall have the option to terminate same, by written notice, addressed to the last known place of business of party of the second part.

Respondent Coca-Cola is not a party to the contracts between respondents Thomas Company, Thomas Works and Works 3rd and their bottlers but it has consented to such contracts. Respondents are without knowledge or information sufficient to form a belief as to the allegations of said Paragraph Six as to re-

spondent Coca-Cola.

8. Deny the allegations of Paragraphs Seven and Eight of the complaint. The contracts between respondents Thomas Company, Thomas Works and Works 3rd and their bottlers are reasonable; the restrictions contained in these contracts are merely reasonably ancillary covenants necessary to protect the parties in the enjoyment of the legitimate fruits of their lawful contracts, to protect them from unjust use of the fruits by the other party thereto, and to protect valuable trade-marks; and the effect of these contracts has been and will continue to be to increase competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products.

# AS AND FOR A FIRST AFFIRMATIVE DEFENSE

9. The alleged restraints of the contracts between respondent Coca-Cola and its bottlers and between respondents Thomas Company, Thomas Works, and Works 3rd, and their bottlers have been declared by the United States District Court for the District of Delaware to be lawful and valid under the federal and state antitrust laws and, among other things, to be "at most . . . a partial and not . . . a general restraint" and "merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from an unjust use of those fruits by the other party," "[not] having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly," and not containing "anything therein that may be said to be in unreasonable restraint of trade." The Coca-Cola Bottling Co. v. The Coca-Cola Co., 269 Fed. 796 (D. Del. 1920).

10. The contracts challenged herein were included in, and entered as, the judgment of the United States District Court for the District of Delaware in the aforesaid action which judgment has never been rescinded, vacated or modified.

11. The Federal Trade Commission has no jurisdiction or authority to alter or modify a judgment of a United States District Court.

# AS AND FOR A SECOND AFFIRMATIVE DEFENSE

12. Respondents repeat and reallege as if fully set forth herein, the allegations

of Paragraphs 9 through 11 hereof.

13. In attempting herein to declare unlawful and to invalidate provisions of contracts with third parties which have been judicially held to be valid and lawful transfers of "property rights" to said third parties and "perpetual" in nature, the Federal Trade Commission has failed to join indispensable parties, to wit: the bottlers and their successor in interest who are the other parties to said contracts.

# AS AND FOR A THIRD AFFIRMATIVE DEFENSE

14. Respondents repeat and reallege as if fully set forth herein, the allegations of Paragraphs 9 through 11 and 13 hereof.

15. The rights and obligations of respondents and their bottlers under the bottler contract are property rights, as declared by the aforesaid District Court

more than fifty years ago.

16. The Federal Trade Commission is charged with enforcement of the laws under which the aforesaid District Court decided the aforementioned case. Said Commission was aware of said decision for more than five years prior to the time it first announced it intended to issue the complaint in the present proceeding.

17. This proceeding, to the extent that it seeks to eliminate any of the aforesaid rights and obligations of such contracts, constitutes a penalty for forfeiture and is barred by the Statute of Limitations. 28 U.S.C. 2462.

# AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

18. Respondents repeat and reallege as if fully set forth herein, the allega-

tions of Paragraph 9 through 11 and 13, 15, 16, and 17 hereof.

19. The bringing of this action, the relief demanded, and the effects of the institution of this action are and will be unfair and unreasonable and outside the Commission's authority. Among other things: (a) respondents are subject to a judgment of the United States District Court for the District of Delaware incorporating the terms of the contracts in question. If the Commission should prevail in this proceeding, respondents would be placed in a position where, irrespective of the action they took, they would either be in contempt of Court and breach of a court-ordered contract, or, in violation of the Commission's order; and (b) the effect of the proposed order would be to (1) increase prices to consumers; (2) decrease competition; (3) increase prices to small retailers; (4) accelerate the trend to a reduction in the number of small grocers; (5) augment the tendency to increased concentration in the grocery business; (6) favor certain large chain stores who are competitors of the bottlers of Coca-Cola, most of whom are small businesses far smaller than the chains; and (7) make quality control of bottled Coca-Cola substantially more difficult and expensive. The result of the Commission's action would be unfair and anti-competitive.

20. Respondents' rights to due process of law under the Fifth Amendment

to the Constitution of the United States are and will be violated.

# AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

21. Respondents repeat and reallege as if fully set forth herein, the allegations of Paragraphs 9 through 11 and 13, 15, 16, 17, 19, and 20 hereof.

22. There is no public interest in this proceeding.

Wherefore, respondents pray that the complaint herein be dismissed. Respectfully submitted,

LORD, DAY & LORD, By GORDON SPIVACK, A Member of the Firm.

New York, N.Y.

MILLER, MARTIN, HITCHING, TIPTON, LENIHAN & WATERHOUSE, By J. GUY BEATTY,

A Member of the Firm.

Chattanooga, Tenn.

Actorneys for Respondents: Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., and Coca-Cola Bottling Works 3rd, Inc. NEW YORK, N.Y., August 27, 1971

### CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed to the following counsel a copy of the attached Answer to the Complaint.

GORDON B. SPIVACK,

One of the Attorneys for Respondents Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc., and Coca-Cola Bottling Works 3rd, Inc.

August 24, 1971.

David I. Wilson, Complaint Counsel, Federal Trade Commission, Washington, D.C.; Examiner Edward Creel, Federal Trade Commission, Washington, D.C.; Edward Wolfe, Esq., White & Case, 14 Wall Street, New York, N.Y.

### UNITED STATES OF AMERICA

### BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8853)

IN THE MATTER OF CRUSH INTERNATIONAL LIMITED, A CORPORATION: AND BEVERAGES
INTERNATIONAL INC., A CORPORATION; AND CRUSH INTERNATIONAL INC., A
CORPORATION

### COMPLAINT

The Federal Trade Commission, having reason to believe that the partles named in the caption hereof, each of which separately is made and sometimes hereinafter referred to as respondent(s), or respectively as Crush International Limited, Beverages International Inc. or Crush International Inc., have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: For the purposes of this complaint, the following defini-

tions shall apply:

(a) Bottler—any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Cental warehousing—a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets

or wholesalers;

(c) Concentrate—the basic soft drink ingredient sold to bottlers by respondents, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) Consignment—a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who

is indistinguishable from a salesman or agent;

(e) Place of business—the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business head-quarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup—soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600

six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup—although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six ounce finished soft drink servings per tank; and

(h) Soft drink products—nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through

pre-mix and post-mix systems or the like.

PARAGRAPH TWO: Respondent Crush International Limited is a corporation organized, existing and conducting its business under and pursuant to the laws of the Province of Ontario, Canada. It maintains its office and principal place of business at 1590 O'Connor Drive, Toronto 16, Canada. In the United States, an office is maintained at 2201 Main Street, Evanston, Illinois 60202.

Respondent Beverages International Inc., a wholly-owned subsidiary of Crush International Limited, is a corporation organized, existing and conducting its

business under and pursuant to the laws of the State of Illinois. It maintains its office and principal place of business at 2201 Main Street, Evanston, Illinois 60202.

Respondent Crush International Inc., a wholly-owned subsidiary of Crush International Limited, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 2201 Main Street, Evanston, Illinois 60202.

PARAGRAPH THREE: Respondent Crush International Limited is engaged principally in the manufacture and sale of concentrate which it sells to its bottlers who purchase the concentrate under a license to produce and sell soft drink products under such trade names as "Orange Crush." "Gurd's Ginger Ale," "American Dry Ginger Ale," "Hires Root Beer," "Kick-Kola," "Grape Crush," "Lime Crush," "Grapefruit Crush," "Lemon-Lime Crush Cola," "Crush Cream

Soda," "Bitter Lemon," "Brio Chinotto," and "India Express."

Plants for the manufacture of concentrate are located in Canada at Toronto and Ottawa, Ontario and Montreal, Quebec, and in the United States at Evanston, Illinois and Trenton, New Jersey. Approximately 300 United States and 30 Canadian bottlers are franchised to sell its Orange Crush and/or Hires Root Beer soft drink products. Bottlers combine the concentrate with water and other ingredients and package the mixture in bottles for resale as soft drink products to retailers.

For the year ending October 30, 1968, Crush International Limited had sales of \$33,069,442, and assets of \$21,178,277 (Canadian dollars). As to its whollyowned United States subsidiaries, Beverages International Inc. and Crush International Inc., sales of concentrate and Orange Crush and Hires Root Beer soft drink products were made to over 300 domestic bottlers in 1968. In the United States, agreements for Orange Crush and Hires Root Beer trademarked concentrate and soft drink products are between the bottler and Crush International Inc. and Beverages International Inc.

Corporate officers of Beverages International Inc. and Crush International Inc., are identical; and Mr. Louis Collins is President of these respondents as

well as of respondent Crush International Limited.

PARAGRAPH FOUR: Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate and foreign commerce regarding concentrate and soft drink products exists between offices in Evanston, Illinois and Toronto, Ontario, and production facilities in Canada at Toronto and Ottawa, Ontario, and Montreal, Quebec, and in the United States at Evanston, Illinois, and Trenton, New Jersey, and the numerous bottlers located throughout the United States which purchase their products.

PARAGRAPH FIVE: In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of concentrate and soft drink products in

commerce

PARAGRAPH SIX: Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under their trade names by restricting bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondents Beverages International Inc., or Crush International Inc., and their bottlers. A typical agreement between respondents Beverages International Inc., and their bottlers provides that:

"Bottler shall use its best efforts to sell [CRUSH/HIRES] within TERRITORY and not deliver or sell [CRUSH/HIRES] outside of TERRITORY. Bottler shall not knowingly sell [CRUSH/HIRES] within TERRITORY for resale or delivery outside of TERRITORY or sell or deliver [CRUSH/HIRES] to any person after having been notified by COMPANY that such person is reselling

or delivering [CRUSH/HIRES] outside TERRITORY."

PARAGRAPH SEVEN: The aforesaid agreements used by respondents, Beverages International Inc. and Crush International Inc., the wholly-owned subsidiaries of respondent Crush International Limited, have had, and may continue to have, the following effects:

(a) Competition between and among respondents' bottlers in the distribution and sale of "Hires Root Beer" and "Orange Crush" brands of soft drink products has been eliminated;

(b) Innumerable retailers and other customers have been deprived of the right to purchase "Hires Root Beer" and "Orange Crush" brands of soft drink prod-ucts from the bottler of their choice at a competitive price; and (c) Consumers of "Hires Root Beer" and "Orange Crush" brands of soft

drink products have been deprived of the opportunity of obtaining such prod-

ucts in an unrestricted market and at competitive prices.

PARAGRAPH EIGHT: Respondents' contracts, agreements, acts. practices and methods of compecition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 15th day of July 1971, issues its complaint against said

respondents.

### NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of September A.D. 1971, at 10 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Pennsylvania Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed

to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above described shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial

decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to respondents might be inadequate fully to protect the consuming public or the competitive conditions of the soft drink industry, the Commission may order such other relief as it finds necessary or appropriate, or such relief as may be supported by the record to protect the competitive viability of small bottlers.

#### ORDER

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IT IS ORDERED that Crush International Limited, Beverages International Inc. and Crush International Inc., and the officers, agents, representatives, employees, successors and assigns of each repondent, directly or through any corporate or other device, in connection with the advertising, merchandising, offering for sale and sale or distribution of soft drink products, concentrate, pre-mix syrup or post-mix syrup, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly

or indirectly:

1. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, including consignment agreement, to: (a) limit, allocate or restrict the territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom soft drink products or pre-mix or post-mix syrups may be sold by bottlers; (b) restrict the location of a bottler's place of business; (c) provide for an allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engage in any act, practice or conduct having like or similar purpose or effect

Imposing or attempting to impose any limitations or restrictions respecting: (a) the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers may sell pre-mix or post-mix syrups, or soft drink products; (b) the location of the bottler's place of business; (c) the allocation of fees between one bottler and other bottlers for sales in any particular geographical area, or to any person, or class of persons (including but not limited to central warehousing customers); or (d) engaging in any act, practice or conduct having like or similar purpose or effect.

3. Refusing to sell, threatening to refuse to sell or impairing sales to any bottler anything used in the manufacture and sale of soft drink products, including but not limited to, concentrate, pre-mix concentrate, post-mix concentrate, or the container in which they are sold; or in any way penalizing any bottler because of the: (a) territory in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom bottlers sell soft drink products or pre-mix or post-mix syrups; (b) the location of the bottler's place of business; or (c) the refusal of the bottler to allocate fees between himself and other bottlers for sales to any person, or class of persons (including but not limited to central warehousing customers), or in any geographical area.

4. Attempting to enter into, entering into, continuing, maintaining, enforcing or renewing any contract, combination, understanding or agreement, or imposing or attempting to impose any requirement, that any bottler, in any manner, inform it of the territories in which, or the persons or class of persons (including but not limited to central warehousing customers) to whom the bottler sells or attempts to sell, soft drink products, or pre-mix or post-mix syrups.

IT IS FURTHER ORDERED that respondents, shall within sixty (60) days after service upon them of this order serve upon all bottlers of soft drink products in the United States a copy of this order along with a copy of the attached letter on Crush International Limited official company stationery and signed by the president of each respondent.

III

IT IS FURTHER ORDERED that the respondents shall forthwith distribute a copy of this order to each of their subsidiaries and operating divisions in the United States. TV

IT IS FURTHER ORDERED that respondents notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations aris-

ing out of the order. IT IS FURTHER ORDERED that each respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied

with this order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 15th day of July, A.D., 1971,

By the Commission.

[SEAL]

CHARLES A. TOBIN, Secretary.

# UNITED STATES OF AMERICA

### BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8853)

IN THE MATTER OF CRUSH INTERNATIONAL LIMITED, A CORPORATION; AND BEVERAGES INTERNATIONAL INC., A CORPORATION; AND CRUSH INTERNATIONAL INC., A CORPORATION

Answer of Crush International Limited, Beverages International Inc., and Crush International Inc.

A. Leslie Hodson Joseph Ducoeur Richard P. Rogers Kirkland, Ellis, Hodson, Chaffetz & Masters, 2900 Prudential Plaza, Chicago, Ill.

AUGUST 24, 1971.

# UNITED STATES OF AMERICA

### BEFORE THE FEDERAL TRADE COMMISSION

(Docket No. 8853)

IN THE MATTER OF CRUSH INTERNATIONAL LIMITED, A CORPORATION; AND BEVERAGES
INTERNATIONAL INC., A CORPORATION; AND CRUSH, INTERNATIONAL INC., A
CORPORATION

Answer of Crush International Limited, Beverages International Inc., and Crush International Inc.

Now Come Respondents CRUSH INTERNATIONAL LIMITED, BEVERAGES INTERNATIONAL INC. and CRUSH INTERNATIONAL INC., by their attorneys, A. Leslie Hodson, Joseph DuCoeur, and Richard B. Rogers, and in answer to the complaint herein, state as follows:

1. Respondents admit that paragraph 1 purports to set forth certain definitional

allegations.

2. Respondent—Crush International Limited denies the allegation contained in paragraph 2 that Crush International Limited maintains an office at 2201 Main Street, Evanston, Illinois. The remaining allegations of paragraph 2 are admitted

by Respondents.

3. Respondent—Crush International Limited denies the allegations of paragraph 3 that Crush International Limited maintains manufacturing plants in the United States or franchise agreements with United States bottlers. Crush International Limited further denies that its Canadian bottlers are licensed to sell soft drink products under the trade names of "Kick-Kola." "American Dry Ginger Ale." "Lemon-Lime Crush Cola." or "Bitter Lemon." Respondents admit the remaining allegations of paragraph 3.

4. Respondent—Crush International Limited denies the allegation of paragraph 4, with the exception that Hires concentrate is occasionally shipped from the United States to Canada for sale only in Canada. Respondent—Beverages International, Inc. and Crush International, Inc. admit the allegations of paragraph 4

as those allegations relate to Respondents' domestic operations.

5. Respondent—Crush International Limited denies the allegation of paragraph 5 that Crush International Limited is engaged in competition with corporations, firms, partnerships or persons located within the United States. Respondents admit the remaining allegations of paragraph 5.

6. Respondents—Beverages International Inc. and Crush International Inc. admit that a typical agreement between respondents and their bottlers contains

language substantially identical to that quoted in paragraph 6. The remaining allegations are denied by respondents.

7. Respondents deny each and every allegation contained in paragraph 7.

# 8. Respondents deny each and every allegation contained in paragraph 8.

### AFFIRMATIVE DEFENSES

1. The complaint herein is fatally defective in that complaint counsel have failed to join Respondents' various franchised bottlers located throughout the United States. Since the rights of Respondents' bottlers under their franchise agreements will be substantially altered should the relief requested by complaint counsel be granted, Respondents' bottlers are indispensable parties to this controversy.

2. The complaint should be dismissed as contrary to the public interest.

3. The relief requested by the complaint herein would impair the validity of

Respondents' rights under the Federal Trademark Laws.

4. This proceeding, to the extent that it seeks to eliminate the contractual rights of Respondents and Respondents bottlers, would impose a penalty or forfeiture and is barred by the Statute of Limitations, 28 U.S.C. § 2462.

WHEREFORE, Respondents respectfully request that the complaint herein

be dismissed.

A. LESLIE HODSON,
JOSEPH DUCCEUR.
RICHARD B. ROGERS,
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS,
2900 Prudential Plaza, Chicago, Ill.

AUGUST 24, 1971.

### CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed to the following counsel for each of the respondents a copy of the attached Answer to the Complaint.

RICHARD B. ROGERS,

One of the Attorneys for Respondents Crush International Limited, Beverages International Inc., and Crush International Inc.

August 24, 1971.

Robert B. Lee, David I. Wilson, Complaint Counsel. Federal Trade Commission, Washington, D.C.; Edward Wolfe, Esq., White and Case, 14 Wall Street, New York, N.Y.; Milton Handler, Esq., Kaye, Scholer, Fierman, Hays and Handler, 425 Park Avenue, New York, N.Y.; Frederick Rowe, Esq., Kirkland, Ellis, Hodson, Chaffetz, Masters, and Rowe, 1776 K Street, N.W., Washington, D.C.; Robert Bicks, Esq., Breed, Abbott and Morgan, 1 Chase Manhattan Plaza, New York, N.Y.; W. D. White, Esq., White, McElroy and White, 2505 Republic National Bank Tower, Dallas, Tex.; Gordon B. Spivack, Esq., Lord, Day and Lord, 25 Broadway, New York, N.Y.; Earl W. Kintner, Esq., Arent, Fox, Kintner, Plotkin and Kahn, 1815 H Street N.W., Washington, D.C.; James G. Frangos, Esq., Pepsi-Co., Inc., Purchase, N.Y.

# STATEMENT OF EARL W. KINTNER, NATIONAL SOFT DRINK ASSOCIATION

Senator HART. We are delighted to have Earl Kintner speak from a very broad background and an excellent record of protection of consumers and small businesses over a long period of years.

At this time Mr. Kintner appears before us testifying on behalf of the National Soft Drink Association with respect to several of these pending bills.

We have ordered the statement to be printed in full. If you will

summarize, we will be very—

Mr. KINTNER. I will, Mr. Chairman.

(Documents follow. Testimony resumes on p. 322.)

STATEMENT OF EARL W. KINTNER ON S. 3133 AND SIMILAR BILLS

Mr. Chairman and Members of the Subcommittee: I am exceedingly grateful for the opportunity to appear before you today on behalf of the National Soft

Drink Association and to urge your favorable consideration of S. 3133 and identical Senate bills.

The proposed legislation and my presence before you today are the direct result of the proceedings which the Federal Trade Commission has brought against eight soft drink franchise companies, challenging for the first time the legality of their territorial arrangements with their franchised botters, many of which have existed for over three-quarters of a century. The bills which you have before you today would, under specifically delineated conditions, preserve

the legality of such territorial arrangements.

I think it might be useful if, for the purpose of my discussion, I first defined the terms which I will be using during my presentation. These definitions are the same as are used in the report prepared by the management consulting firm of Cresap, McCormick and Paget, Inc., which has been submitted for the record in these proceedings.1 By "franchise company" I mean a producer of flavoring concentrates or syrups that are used in the production of soft drinks by franchised bottlers, as, for example, the Dr. Pepper Company, the Coca Cola Company, etc. A "store controlled label" is a proprietary brand of soft drink sold by a supermarket chain, as, for example, "Cragmont", which is the Safeway label, "Yukon Club", which is the A&P label, etc. "Private label" refers to soft drinks manufactured and distributed under the brand name of an independent producer, as, for example, "Shasta", "Frank's" and "Faygo." When I refer to a 'supermarket chain", I will be talking in terms of a group of eleven or more stores supplied primarily from central warehouses; and, finally, by "food broker" I refer to an independent local business that distributes food products to retail outlets such as grocery and convenience stores (small, independent food stores that carry a fairly full line of food products, but with little variety of brands and sizes). A food broker generally does not represent the products of competing manufacturers. (Study at 3.)

With your indulgence, I would like at the outset briefly to state the several points which I intend to make and, following that, I will discuss these points

more thoroughly.

First, I think it is important to note that what is involved in the FTC proceeding is the prospect of a drastic refashioning of the way soft drinks are brought to market, and that the changes resulting therefrom would be imposed upon an industry which has served the consuming public well over the years. The franchise system, with its territorial limitations, has been in effect in the soft drink industry for approximately three-quarters of a century. It was developed by the soft drink franchise companies as a means of getting national distribution of their products by encouraging small businessmen to invest their business lives and their savings in the sale and promotion of soft drinks and, conversely, by imposing territorial restrictions, the syrup companies could identify the source of packaged soft drinks and thereby better assure the maintenance of quality and uniformity in accordance with the trademark owner's duty to supervise and control the manner in which his marks are used. On the basis of his territorial assurance, each bottler undertook to manufacture, distribute and sell soft drinks as intensively as possible in his territory, using the manufacturer's syrup in accordance with the formula provided. He invested heavily in plant, equipment and wagons (and subsequently trucks) and developed his territory to the fullest extent possible. Without territorial protection, I cannot conceive of any responsible businessman undertaking the risks involved. The results have been good, although there have been periods in the industry, as in all others, when its members have had to struggle to stay alive. The fact that a bottler received a particular territory in no way eliminated competition between him and bottlers of other soft drink products. On the contrary, the competitive battle has been fierce, and it is fierce today.

Second, the proposals of the Commission staff threatens to force the wholesale consolidation of bottling operations which are primarily family-owned small businesses, many of which have been passed down from generation to generation. One thing that emerged clearly from Mr. Rainwater's description of the history of the industry and its nature today is that the backbone of the industry is in small towns and the vast majority of bottlers are small businessmen.

As some of you may know, earlier in my career I served as General Counsel and subsequently as Chairman of the Federal Trade Commission. My views with regard to the need to preserve small business as a vital competitive force in this

<sup>&</sup>lt;sup>1</sup> Cresap, McCormick and Paget, Inc., "A Study of the Soft Drink Bottling and Canning Industry and the Impact of the FTC Complicint on the Industry's Future", July 1972 [hereinafter cited as "Study"].

country have never wavered, either during my Government service or since entering private practice. It is my firm opinion that if the Federal Trade Commission prevails in the proceedings it has brought against the soft drink companies, it will remove from the American scene one more major small business-oriented industry. We have already seen the demise of the small independent baker, of the small independent dairy, of the small ice cream manufacturer. These products now are being provided by giant organizations operating through large central distribution facilities. The soft drink industry is confronted with the same prospect today.

My third point is that the effect of enacting the legislation before you would not be to impair competition. Rather, its passage, in my opinion, would promote the basic objectives of antitrust policy. I will go into this matter in considerable

detail later in my discussion.

My fourth point closely follows the preceding point: the need for this legislation is not only vital in the interest of sound antitrust enforcement, but also its early passage is urgent because the industry is wracked with uncertainty as the result of the pending Federal Trade Commission proceedings which threat-

en it with a prospect of disastrous restructuring.

In my opinion, the attitude of the Commission staff in these cases is unprecedented. It is hard to believe, but they are urging, not the continuance of small business units, but their disappearance through merger. They have specifically indicated, in the Federal Trade Commission staff document 3 which all of you undoubtedly have received, that many small soft drinks bottlers will go out of business if the Commission proceedings are successful, and that those who survive will have to grow—by merger or otherwise. They theorize that the losses incident upon the demise of many bottlers and the merger of others will be offset by the emergence of the practice of warehouse distribution of soft drinks and, theoretically (and I say "theoretically" with due deliberation), lower soft drink prices. I have no doubt that if the Federal Trade Commission staff is successful, warehouse distribution of soft drinks will become the way of life in the soft drink industry, but I do not, for a moment, believe that any significant, longrange price savings will result. As a result of the Commission's actions, capital investment by bottlers is now hazardous, and many are wondering whether they should sell out and get the best price they can before disaster strikes.

I might also say, and this will be brought out by others as well, that if central warehousing of soft drinks is the ultimate result, this country can say farewell to returnable soft drink bottles which represent not only the lowest priced soft drinks produced by franchised bottlers, but also have ecological implications,

which, I am sure, are clear to all of you.

In my opinion, legislation is needed to forestall potential consequences from the proceedings brought by the Federal Trade Commission against the soft drink franchise companies which strike at the heart of the bottler rather than the franchise company, consequences which have not been foreseen by the Commission, which are not consistent with sound antitrust policy and which would not serve the public interest. In summary, these consequences would be:

(1) To eliminate hundreds of small businesses as manufacturing and distributing licensees of trademarked products within the soft drink bottling industry and

similar industries.

(2) To foster the growth of large soft drink bottling firms and to force concen-

tration upon the soft drink bottling industry and similar industries.

(3) To unfairly deprive small soft drink bottlers of the substantial values in plant investment and good will which they have built up in their businesses over the years,

(4) To compel remaining soft drink bottlers to adopt warehouse delivery as

their primary, if not sole, method of distribution,

(5) To stimulate vertical integration by franchise companies and by chain stores within the soft drink industry,
(6) To greatly strengthen the economic power of supermarket chains in the

distribution and sale of soft drinks, and

(7) To eliminate the use of returnable bottles with their lower price and favorable ecological impact.

<sup>&</sup>lt;sup>2</sup> FTC Bureau of Competition and Bureau of Economics, "Statement in Opposition to H.R. 12261, and Identical Bills, Legislation Which Would Legalize Territorial Restrictions in the Soft Drink Industry", March 31, 1972 [hereinafter cited as "Statement"].

I.

I'd like to return to my point that this industry has, by means of the franchise system with its designated territories, performed well and that substantial public benefits will be lost from the break up of the territorial system. Since they are engaged in manufacturing as well as distribution, bottlers are required to make a considerably higher level of investment than are other small businessmen engaged solely in food distribution. Without an assurance of sufficient volume to warrant these capital expenditures, few bottlers could justify risking so much capital. And this is one of the merits of the territorial system. It designates a service area which, if developed, can provide the volume of sales necessary to

justify the bottler's investment in plant and equipment.

Another outstanding characteristic of soft drink distribution is the wide-spread availability of the product. The consumer can obtain soft drinks virtually everywhere—at grocery stores, service stations, eating places, sporting events, office buildings, etc. This widespread availability is not inevitable, nor even easy to accomplish. Indeed, because they are bulky, low-priced items, soft drinks are difficult and costly to distribute. However, under the traditional territorial system bottlers have been able and willing to assume responsibility for supplying all possible outlets in their territories. Undertaking this responsibility has been practicable only because the territorial arrangements has enabled bottlers to set up established routes which minimize substantial between-stop costs. In this way the system deals with the potential danger that smaller retailers might be disfavored vis a vis large outlets. Without the concept of territory there would be no practical test of the bottler's performance in serving all outlets in an area. Likewise, there would be no way to assure any particular retailer of a source of supply.

Under the traditional system the industry has exhibited considerable flexibility and innovation. For example, in recent years numerous regional brands have been able to expand into new markets. Thus, between 1970 and 1971, Ma's Old Fashioned, Inc. has increased its franchised plants from forty-seven to sixty-seven and No-Cal Corporation increased its franchises from fourteen to forty. There are many similar examples. The entry into new markets has been in part responsible for the dramatic growth in sales of small companies—Nesbitt's from ten to eighty-four million cases between 1964 and 1970, Dad's from 3.5 to 28.5 million, to name just a few. Similarly, numerous new products [e.g. diet soft drinks] have been introduced in recent years.

Historically, the territorial system has tended to encourage the continued sale of soft drinks in returnable bottles-with obvious ecological benefits. If territorial franchises are eliminated, nonreturnable containers would be given an impetus because soft drinks in returnable containers, although offering by far the lowest priced soft drinks, cannot economically be shipped as far as soft drinks in nonreturnable containers. Moreover, since the bottler needs to recover and reuse his returnable bottles a certain number of times in order to cover his costs, he is unlikely to ship these containers to points where he cannot recover them. Elimination of the territorial system is likely to hasten the demise of the returnable bottle in another way: the bottler whose territory is being invaded is likely to discontinue all returnables because he has no practical way of preventing an invading bottler from carrying off his glass. In contrast, there is little reason to expect that the warehouse facilities on which the Federal Trade Commission staff places so much reliance would encourage the sale of returnable containers. Central warehousing is geared to the use of one-way containers, and in many instances chain stores have refused to handle returnable bottles.

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I'd like to turn now from these brief considerations of industry performance to the important question of the industry's composition and structure. In my opinion the FTC staff has failed to give proper regard to Congressionally approved policies by failing to take into account the localized, small business character of this industry. The maintenance and fostering of small business has, in the past, been a fundamental goal of our antitrust laws and of the Federal Trade

<sup>&</sup>lt;sup>3</sup> "Statement of the National Soft Drink Association Submitted to the Honorable James O. Eastland In Response to the Joint Statement of the Bureaus of Competition and Economics of the Federal Trade Commission" (August 4, 1972) at pp. 29-30.

Commission. For instance, the Robinson-Patman Act, which is enforced by the Federal Trade Commission, was passed in order to limit the economic power of the larger businesses within distribution systems, and to assure the survival of small businesses by enhancing their economic opportunities. In his book, *The Price Discrimination Law*, Professor Corwin Edwards has graphically described the legislative history of the Robinson-Patman Act as the response by Congress to the threat which the growing tide of chain stores presented to small businesses. Professor Edwards described the chain stores of the era on page 9:

"[T]hey resembled monopolies in the fact that their scale of operations had outrun that of their small competitors and in the fact that their size had given them not only certain functional advantages but also bargaining power and power

of maneuver that were not available to small enterprises.'

The adverse effects of such concentrated economic power were decried by Congressman Celler in 1949 during the floor debate in the House over the

Celler-Kefauver Amendment, and I quote:

"Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is fast disappearing, and second, is being made dependent upon monster concentration." (95 Cong. Rec. 11486.)

On the Senate side, Senator Kefauver expressed similar concern, and again

I quote:

"I think that we are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations...? Or on the other hand are we going to preserve small business, local operations,

and free enterprise?" (96 Cong. Rec. 16450)

In the instant soft drink proceedings, the inadequate concern which the staff of the Federal Trade Commission has demonstrated for small bottlers can be gleaned from the Statement of the staff concerning this proposed legislation. A review of pages 19 through 23 of the Statement reveals a belief on the part of the Commission staff that there is little room for small businessmen in the soft drink bottling industry because, the staff asserts, small bottlers allegedly are not as efficient as large bottlers. As a matter of policy, therefore, the staff of the Federal Trade Commission believes that the continued survival of small bottlers depends upon their becoming large bottlers, either by internal growth or by merger. The express concern of the Commission staff is that those bottlers who remain in the industry should grow to what the staff has vaguely referred to as "efficient size." To the Commission staff, the achievement of efficiencies by economies in scale is paramount.

As a former Chairman of the Federal Trade Commission, I feel compeiled to point out the inadequacy of an antitrust enforcement policy which places efficiency above all else, especially when it places efficiency above the survival of small business entities. Relative efficiencies between competitors can be an important element of competition. The achieving of efficiencies can also produce cost savings, but there is a danger that antitrust enforcement policies which rigorously seek only the achievement of ultimate or absolute efficiencies will reduce the number of firms competing in that industry to a relatively few large businesses, thereby actually promoting the concentration of economic power

among the remaining firms in that industry.

For my part, I do not believe it is sound antitrust policy to sacrifice the small business character of this industry for the sake of speculative efficiencies. In preparing for these hearings, as I mentioned earlier, the management consulting firm of Cresap, McCormick and Paget. Inc. was requested to undertake a study of the soft drink industry, both as to its characteristics and as to the likely results if the Federal Trade Commission prevails in its proceedings against the soft drink franchise companies. The study documents the fact that soft drink plants are widely dispersed throughout this country's small cities and towns. Thus, in 1971, 2.878 soft drink bottling plants were located in 1,584 different cities—1,062 were located in the South, 746 in the North Central region. 659 in the North East and 411 in the West. About sixty-one percent of these plants were located in cities with populations of 50,000 or less and constitute a significant source of employment in these communities. (Study at 5.) I quote from the Study:

"The largest proportion of bottlers are privately owned and situated in small cities. In most cases, the bottler is an important leader in his business and civic community and his operations provide local employment and tax revenue. The

bottler responds quickly to the needs and demands of retailers and consumers

because of his unique position in the local market." (Study at 14.)

The Study also clarifies a point discussed in the Federal Trade Commission staff memorandum concerning ownership of bottling companies. The Federal Trade Commission staff memorandum made much of the point that some bottling companies are owned by franchise companies and that other bottling companies are publicly owned or are part of conglomerate enterprises. Yet, according to the Cresap study, privately owned bottling plants accounted for about 93% of all bottling plants in the United States in 1971. I again quote from the Study

"For the most part, these plants have had the same family ownership for decades, and they are the foundation of the soft drink bottling and canning

industry." (Study at 17.)

In 1971, according to the Study, franchise companies owned only about three percent of the soft drink bottling plants in the United States. Only two percent of such plants were owned by publicly held corporations and another two percent were owned by companies whose primary business activity is not the manufacture and sale of soft drinks. Soft drink production attributable to businesses outside the industry is less than four percent of total soft drink production. (Study at 17.) So what have we then? Only seven percent of the botfling plants in the United States are not privately owned and ninety-six percent of the soft drink bottling business is conducted by companies engaged solely in the soft drink industry who are not involved in railroading, motion pictures, or other unrelated enterprises.

"he Commission staff also emphasized market concentration but, in fact, in 1967, according to the Cresap Study, the four largest bottling companies in the industry accounted for only thirteen percent of total industry sales and the fifty largest bottling companies had only thirty-eight percent of such sales. (Study

at 19.) This is hardly the picture of a highly concentrated industry

In contrast, the Study points out that concentration in other food industries is considerably higher than in the soft drink industry. For example, the fifty largest companies in the ice cream industry have sixty-eight percent of sales, in carned fruit juices they have eighty-six percent, in canned vegetable juices they have ninety-eight percent. (Study, Exhibit V-4.) in my opinion, therefore, the Trade Commission staff Statement gives a misleading picture of the industry. presumably to create a climate for justifying its elimination of thousands of small businessmen and years of family investment in order to give greater power to chain grocery stores and the truly large food enterprises in this country. I do want to make it clear that the Trade Commission itself, as the decision-making body. I am sure has in no way participated in the preparation of the staff document and the Commission members themselves might well be surprised to learn the facts I have just presented. I know that if I were still Chairman of the Commission I would be.

Strange as it may seem, the Commission staff's solution to what it regards as the industry's competitive defects is to foster a wave of mergers. Thus, the Commission staff indicates on page 19 of its Statement on the proposed legislation that if the bottling territories end, mergers among many of the smaller bottlers must result. On page 23, the Commission staff euphemistically states its policy premoting consolidation of economic power in the bottling industry by stating "Mergers among small bottlers will not be opposed . . ." Granted that the staff intends to stop acquisition by certain bottlers, its posture is clearly to encourage widescale consolidation in the industry and the exodus of the small family type operation.

This is the first time in my long and continuing acquaintance with the Federal Trade Commission and with the policies underlying enforcement of the antitrust laws, that the Government has actively and openly enunciated a policy promoting mergers, I find it difficult to believe that the Commission, with its broad panoply of powers, cannot find a less drastic means to remedy whatever com-

petitive defects it may find.

III

It has been said that the Federal Trade Commission is trying to restructure the bottling industry. If there was ever any doubt about this, it has been resolved by the Commission staff in its Statement relating to this proposed legislation. The Commission devotes five of the thirty pages of its Statement to an exposition on the virtues of central warehousing as a method of distributing soft drinks. The Commission staff denies that it is advocating the use of central warehousing, yet it suggests on page 23 of its Statement that ending bottling territories may lead to increased use of central warehousing, that central warehousing may offer cost advantages and that any cost savings possibly will be passed on to consumers.

The Commission's lengthy recitation of reputed and alleged benefits of central warehousing represents its very forceful suggestion that warehousing is the

method of distribution which the industry should adopt.

In point of fact, the major portion of the cost savings which the Commission staff alleges would result from destruction of the soft drink bottling territories is attributable to the assumed adoption of central warehousing. (The other source from which the staff claims major cost savings could result is in the area of increased price competition which allegedly would result from removal of the territories). In stating that developments in transportation would now allow effective competition from afar, the staff, on page 24, for instance, of its Statement, assumes that bulk deliveries to a single warehouse would be possible. My point here simply is that the Commission staff has assumed existence of a widespread warehouse distribution system as the major premise for the cost savings which it claims would result from eliminating the soft drink bottling territories. It cannot and should not be heard now to deny that its soft drink cases, if successful, can and will restructure the soft drink bottling industry.

Another restructuring phenomenon which would be a likely result of destruction of the bottling territories would be increased vertical integration within the industry. The existing bottling territories provide franchisor soft drink companies with an efficient means of controlling the use of their trademarks and the quality of the products bearing their trademarks, and give small bottlers with the incentive to undertake the substantial investment and effort required to produce trademarked products having a uniformly high quality. Unless a trademark licensor exercises adequate control over its trademarked product, the trademark may become diluted and the product may lose its commercial value. It seems to me that the combined effects of slackened trademark and quality control, substantial interference with the bottler's incentive to maintain product quality, and reduction of the bottling industry to a relatively few large bottlers would

indeed stimulate vertical integration. This restructuring of the soft drink industry will very much strengthen the already strong hands of the chain supermarkets. It will give them pervasive control in one more line of food products. Since the 1930's, the Federal Trade Commission has been painfully aware of and concerned about the growth of the supermarket chains and the tremendous concentration of economic power in their hands. The studies and reports of both the National Food Commission and the Federal Trade Commission in the mid 1960's confirm that concentration in food retailing continues and that the economic power of the large grocery chains

remains unabated.

The economic power of the supermarket chains is already keenly felt in the soft drink bottling industry. The chains exercise critical control over shelf space and wield vast economic power as large customers of bottlers. A distribution system primarily based on central warehousing would only increase the power of the supermarket chains and thereby erode the remaining ability of small bottlers to resist the economic leverage which the chains wield. The only alternative, as the Commission staff recognizes, would be for economic power in the soft drink bottling industry to become concentrated to a point where it could cope with the purchasing power of the chains. But this is fighting concentration with concentration.

It is bewildering for the soft drink industry to find that the Federal Trade Commission staff would not only allow but actively foster such a situation. As if the concentration within the bottling industry which would result from the soft drink proceedings were not bad enough, there also lurks the virtual certainty that these proceedings would also subject the bottling industry further

to the adverse effects of concentration in the retail grocery industry.

The Federal Trade Commission, in my opinion, is exceeding its proper role as a law enforcement agency if it indeed is seeking to impose upon the bottling industry a single method of distribution and thereby engage in economic regulation of this industry.

For bottlers wishing to expand their sales areas and production to coincide with the distribution area of larger purchasers, the alternatives of acquisition, merger or cooperative venture are available and have been recognized by the Commission staff on page 19 of the Statement prepared for members of Congress.

To discuss further a point I made earlier, another way in which the present structure of the soft drink bottling industry would be harshly disturbed by elimination of bottling territories is the restriction of its freedom of choice as to the types of containers to be used. Presently, well over half of all soft drinks are packaged in returnable glass bottles. A central warehousing distribution system would not be compatible with the use of returnable bottles. Returnable bottles have to be sorted upon their return to the retailer by consumers and, after sorting, they must be returned by retailers to the appropriate bottlers. Central warehousing frustrates this process of sorting and returning bottles because of the great difficulty and costs involved in processing the many different types and brands of soft drink bottles which would be handled in warehouse systems.

This is unfortunate because returnable bottles have at least two major benefits for consumers. First, they reduce the per ounce cost of soft drinks to a level considerably below the cost of soft drinks which are packaged in nonreturnable containers. In a recent article published in *Environment* magazine, <sup>5</sup> Bruce M. Hannon found that the purchase price of soft drinks in throw away glass containers is thirty percent more than the price of soft drinks in returnable containers. Mr. Hannon stated that it has been estimated that a return to returnable bottles from nonreturnable containers would reduce the purchase cost of beverages

in this country by \$1.4 billion per year.

The second major benefit of returnable bottles is their favorable impact upon the environment. Nonreturnable containers create serious problems, not only as litter, but as vast amounts of trash which challenge and sometimes defy our solid wate disposal systems. Returnable bottles can and do alleviate these prob-

lems in a major way.

The adoption of a central warehousing distribution system would eliminate any possibility of using returnable bottles either for cost savings or for their very favorable ecological effect. It would be difficult to overstate the cost of such a loss of choice. As I have indicated, Mr. Hannon's article places the magnitude of the potential cost savings from returnable bottles at well in excess of \$1 billion. In addition, the cost attributable to the environmental impact of not having returnable bottles would be far-reaching and quite large. The present and future aesthetic losses or costs of having only nonreturnable containers are not directly susceptible to evaluation. Other costs such as litter pick up, trash collection, operation of solid waste treatment facilities and landfills, etc., would be more perceptible. They would show up in the budgets of the vast majority of Governmental units throughout our nation. They would also be reflected in the taxes which we all pay and in the correspondingly diminished personal incomes which would be available to us after taxes. In speaking of environmental costs, it seems to me we are again speaking in terms of potentially many millions of dollars.

When we consider all of the likely effects of the soft drink proceedings upon the bottling industry, if the Commission staff is successful, it appears that

destruction of the bottling territories would:

(1) Greatly increase concentration in the bottling industry (the Commission's disposition to favor small mergers would further aggravate this effect).

(2) Greatly strengthen the economic power of the supermarket chains, and

(3) Preempt purchasing and packaging alternatives regarding returnable bottles which could otherwise save consumers and our nation many millions of dollars.

IV

As I mentioned earlier, in my opinion, the legislation before you is consistent with sound antitrust policy. These bills would not confer antitrust immunity upon anyone. They simply would prohibit the imposition of presumptive rules against territorial provisions in those markets where strong interbrand competition exists among products of the same general class. There is no question but that territorial arrangements such as those involved in the soft drink industry promote the widest possible distribution and sale of the franchised product. In effect, the legislation would enable the Congress to reassert the relevance of certain values, e.g., the preservation of small business entities and the recognition of inferbrand competition to which, over the years, antitrust enforcement agencies have paid diminishing attention. If I may, I would like to quote Judge Hand's statement in the Alcoa case which I think summarizes the situation exceedingly well:

"Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for is own sake and in

<sup>&</sup>lt;sup>5</sup> Hannon, "Bottles, Cans. Energy", *Environment*, Vol. 14, No. 2, pp. 11-21 (March 1972).

spite of possible cost, an organization of industry in small units which can effectively compete with each other." 6

We are asking that the Congress reaffirm this proposition which has become

lost in the interest of judicial expediency.

It is commonplace for enforcement agencies to discount the significance of interbrand competition-no matter how vigorous it may happen to be-and to insist that the benefits of competition can be achieved only by means of intrabrand competition. However, one need not be an economic expert to know that in the soft drink industry interbrand competition is fierce and that consumers continually try different brands and compare them in quality and price. The combination of new entrants on the national level, the growth of contract carriers, the increasing sales of private labels and the entry into local markets for the first time of many nationally franchised products has made the soft drink industry even more intensely competitive.

And now, if I may, I would like to proceed to a discussion of the legislation before you, and to give you my opinion as to how it might affect existing anti-

trust law.

As I am sure all of you gentlemen are aware, the courts have traditionally utilized two approaches in reviewing trade practices alleged to be in violation of the antitrust laws. One is the rule of reason approach, in which the court examines the facts of a particular business and the justification for the claimed restraint of trade. The alternative approach which states that certain activities are illegal per se is applied in the case of certain restrictions which by their nature are conclusively presumed to be unreasonable, and therefore illegal, without looking into the particular facts which might or might not justify their use. For example, agreements to fix prices are considered per se illegal and if evidence of this is shown the reason for agreeing to fix prices is irrelevant.

The Federal Trade Commission in its legal memorandum appended to the document submitted to the members of Congress states that all territorial restrictions are illegal per se under the rule established in the case of United States v. (roold, Schwinn & Company (388 U.S. 365 (1967)). It is our opinion that chrim does not stand for such a proposition and that even if it did, the facts of that case are quite different from the situation at hand and whatever rule Schwing laid down is not applicable to the soft drink franchising arrangement. Therefore, my conclusion is that, for both reasons, the legislation before you would not overturn any existing Supreme Court decisions. If I may, I would like to go into further detail with respect to the reasons why I have reached this conclusion.

First, I would like to point out that the basic arrangements in the soft drink industry are, as I am sure you are aware, vertical arrangements, in that they have been entered into between parties at different levels of the market as compared with horizontal arrangements which are entered into between competitors at the same level of the market structure. Moreover, soft dring franchising arrangements, with their territorial limitations, have not been the product of any agreement among the franchisees to force franchise companies to give them territorial exclusivity; what we are dealing with are vertically imposed arrangements entered into at the behest of the franchisors. (The Federal Trade Commission staff is also urging, in my opinion as a smokescreen, that horizontal as well as vertical arrangements are involved here. My sincere opinion is that this claim is without merit).

Second, I want to emphasize that the soft drink industry has not been charged with questions of monopoly or monopolization, nor are the cases concerned with issues of illegality such as price-fixing. The attack is clear and simple. It is aimed primarily at one aspect of the franchise relationship—the vertical ter-

ritorial restriction.

These vertical arrangements, as I indicated earlier, have been in existence in the soft drink industry for nearly three-quarters of a century. Vertical arrangements providing for territorial exclusivity went unchallenged by the Government for the first sixty-odd years after the passage of the Sherman Act, and in the one private case construing the legality of such vertical arrangements in the soft drink industry, the United States District Court for the District of Delaware upheld the legality of such arrangements, The Coca-Cola Bottling Co. v. The Coca-Colu Co., 269 F. 796 (D. Del. 1920). In that case, the Coca-Cola Company sought to cancel the contract which it had entered into for the bottling and vending of Coca-Cola throughout most of the United States, arguing that the contract was

<sup>6</sup> United States v. Aluminum Company of America, 148 F. 2d 416, 429 (2d Cir. 1945).

terminable at will. The Coca-Cola Bottling Company took the position that its contract was perpetual and brought suit to enjoin such cancellation and to obtain specific performance of the contract. The Court denied a motion to dismiss the complaint and upheld the validity of the trademark licensing agreement with its provisions for territorial exclusivity. In so doing the Court rejected all arguments to the contrary advanced by Coca-Cola Company, including the argument that the licensing arrangement was void under the Federal antitrust laws.

Only in relatively recent times, beginning in the late 1940's, has the Government claimed that vertically imposed territorial restrictions are illegal per se. As a result of this effort, which began about 1949, a number of consent decrees were entered into between the Government and companies utilizing vertical restrictions which chose not to fight the issue. Most of these cases, I might add, involved considerations other than mere vertical territorial agreements, as, for example, price-fixing. Moreover, a review of the major cases that have come before the courts reveals that most were brought on the basis of a conglomeration of allegedly illegal practices—price-fixing agreements,7 tie-in sales,8 hori-

zontal territorial restrictions of and exclusive dealing arrangements. 10

Prior to its consideration of the Schwinn case in 1967, the Supreme Court had only one earlier occasion to consider the legality of vertically imposed territorial restrictions. It specifically ruled in that case that there was insufficient evidence available to the Court upon which it could reach a determination as to whether such restrictions should be considered under a rule of reason or accorded treatment as per se unlawful restraints of trade under the antitrust laws. This was the case of White Motor Company v. United States (372 U.S. 253 (1963)). There a truck manufacturer was charged with imposing both territorial and customer restrictions upon its dealers and distributors in violation of § 1 of the Sherman Act. The District Court applied a per se rule. The Supreme Court, however, reversed, rejecting the application of the per se rule to vertical restrictions, saying, through Justice Douglas, that it "knew too little of the actual impact" on competition or the "economic and business stuff out of which these arrangements emerged" to determine whether vertical restraints should be categorized as per se restrictions (372 U.S. at 261, 263). Given the fact that the White case was a case of first impression as to the legality of vertically imposed restrictions, the argument of the Department of Justice in its brief seeking affirmance of the lower Court's decision in White is informative. The Justice Department said:

"A full inquiry into the long-term effects of territorial restrictions such as White's would be incredibly prolonged and complicated and would, in all

probability, be fruitless." (Brief for the United States at 9)

The approach taken by the Justice Department in the White case parallels the attack made in the Schwinn case and the one that is being made by the Federal Trade Commission in the soft drink proceedings. Thus it is perfectly clear that these agencies, in the absence of Congressional guidance, are urging the sacrifice of thousands of small businesses in the interest of administrative

expediency.

Subsequently, applying a "rule of reason" analysis, the Sixth and Seventh Circuits upheld vertical territorial restrictions in two suits brought under Section 5 of the Federal Trade Commission Act. See Snap-On Tools Corp. v. FTC, 321 F. 2d 825 (7th Cir. 1963); Sandura Co. v. FTC, 339 F. 2d 847 (6th Cir. 1964). These cases reaffirmed the "rule of reason" approach to vertical territorial restrictions, rebutting anew the Government's efforts to have such restrictions declared illegal per sc. Nevertheless, the Solicitor General declined to seek certiorari in either case. Evidently, the facts developed in the full-evidentiary hearings in these cases did not make them "suitable vehicles" to convince the Court to establish a rule of per se illegality." Thus, the cases before Schwinn

<sup>7</sup> United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); White Motor Co. v. United States, 372 U.S. 253 (1963); Snap-On Tools Corp. v. FTC, 321 F. 2d 825 (7th Cir. 1963); United States v. Sealy, Inc., 388 U.S. 350 (1967).

8 FTC v. Teraco, Inc., 393 U.S. 225 (1968); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

9 Timben Roller Bearing Co. v. United States, 241 U.S. 593 (1951); United States v. General Motors Corp., 384 U.S. 127 (1966); and Sealy.

10 Brown Shoe Co. v. United States, 370 U.S. 294 (1862); Susser v. Carvel Corp., 332 F. (1965); and Carvel Corp., Optical States (1965); and Carvel Corp., Dkt. 8574, 68 FTC Decisions 128 (1965).

established without exception that vertical territorial restrictions were to be

judged by the "rule of reason."

¶In 1967, the Supreme Court introduced an element of confusion into the approach to be taken under the antitrust laws in passing on the legality of vertical territorial restrictions by virtue of its decision in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

There the Court held that Schwinn's vertically imposed restrictions limiting

the customers to whom its distributors and retailers could resell products purchased from Schwinn violated the Sherman Act, but that under such Act Schwinn could limit distribution by its agents and consignees, where Schwinn had retained all indicia of ownership (including title, dominion, and risk of loss) with respect

to its products.12

¶Schwinn is cited by the Federal Trade Commission staff as establishing a broad rule of per se illegality for all vertical territorial restrictions, including territorial restrictions in soft drink trademark licenses. While there is some language in Mr. Justice Fortas' opinion in Schwinn which suggests it can be so read, the Court makes clear early in its opinion that it analyzed the case under the rule of reason in the context of a complete factual record made in the District Court.

¶At the outset, Mr. Justice Fortas notes that:

"In this Court, the United States has abandoned its contention that the distribution limitations are illegal per se. Instead we are asked to consider these limitations in light of the 'rule of reason', and, on the basis of the voluminous record below, to conclude that the limitations are the product of 'agreement' between Schwinn and its wholesale and retail distributors and that they constitute an unreasonable restraint of trade." (388 U.S. at

\*Later, Justice Fortas again notes (388 U.S. at 373) that "[t]he government does not contend that a per se violation of the Sherman Act is presented by the practices which are involved in this appeal" and that "[a]ccordingly, we remitted to an appraisal of the market impact of these practices." Subsequently, Justice Fortas emphasized that the Court "must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry" (388) U.S. at 374) and that "[o fur inquiry is whether . . . the effect upon competition in the marketplace is substantially adverse", (388 U.S. at 375) citing in the two latter instances Mr. Justice Brandeis' classic formulation of the "rule of reason" in Chicago Poard of Trade v. United States, 246 U.S. 281, 238 (1918).

"Subsequently, various Justices of the Supreme Court have interpreted Schwinn as a "rule of reason" case which did not establish a broad rule of per sc illegality for all vertical territorial restrictions. Concurring in Albrecht v. Herald Co., 200 U.S. 145 (1968), Mr. Justice Douglas, who also concurred in Schwinn, noted that Schwinn was decided on the basis of the "economics of the bicycle business" in the context of a record which "elaborately sets forth information as to the total market interaction and interbrand competition, as well as the distribution program and practices" there challenged, (390 U.S. at 155-156.) Justice Douglas, adhering to his White Motor analysis, went on to note that the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue and would depend on their impact on competition, (390 U.S. at 155-156) Moreover, Justice Marshall, speaking for the Court in United States v. Topeo Associates, Inc., 405 U.S. 596 (1972), was careful to distinguish between vertical and horizontal territorial restrictions, only the latter of which were held to be per sc violations of § 1 of the Sherman Act, (405 U.S. at 607 08),

Finally, Chief Justice Burger, dissenting in Topco, pointed out that in Schwinn, "the Court made it clear that it was proceeding under the 'rule of reason' and not by per se rule." (405 U.S. at 617-18).

Other courts have also interpreted Schwinn as not creating a broad per se rule prohibiting all vertical territorial restraints. A case in point is Tripoli Co. v. Wella Corp., 425 F. 2d 932 (3rd Cir)., cert. denied, 400 U.S. 831 (1970), which involved a prohibition against the resale by a wholesale distributor to non-

<sup>12</sup> The District Court has held that Schwinn's territorial restrictions on rescle by distributors violated the Sherman Act, but Schwinn did not appeal this holding and thus those territorial restraints were not in issue before the Supreme Court. (388 U.S. at 367-368).

professional retail users of a product intended for professional application. There the United States Court of Appeals for the Third Circuit rejected the contention by the plaintiff that Schwinn imposed a per se rule with respect to every post-sale restraint. The Court said: "This restraint must be tested, not by a per se rule, but by the standard of reasonableness." The Court went on to point out that Schwinn involved post-sale restraints on finished goods, bicycles, "a product so simple in use that most ultimate consumers are children." 425 F. 2d at 936. Similarly, in Carter-Wallace, Inc. v. United States., 449 F. 2d 1374 (Ct. Cl. 1971), the United States Court of Claims also refused to accept the premise that Schwinn declared every post-sale restraint to be illegal per se.13 Most recently, a decision in the Ninth Circuit in January, 1972—Anderson v. American Automobile Association, 454 F. 2d 1240 (9th Cir. 1972)—held that under White and Schwinn vertically imposed territorial restrictions are subject to a rule of reason. The Trade Commission staff cites somes post-Schwing cases as standing for the proposition that Schwinn established a general per se rule with regard to territorial restrictions. For the most part, those cases involved either clear per 80 restraints, such as price-fixing, or did not directly deal with the issue. in fact, Schwinn does not stand for the proposition that it established a per se rule against all territorial restrictions, which I sincerely believe it does not, then its theory is that, in the interest of efficient administration of justice, no comprehensive analysis can be undertaken by the courts of the total economic effect of vertically imposed restrictions. The results of such a theory would be the destruction of far more small businessmen than would be helped and the awarding of a distinct competitive advantage to the large manufacturer who can afford to integrate forward or to enter into the major capital investment necessary for consignment selling.

I might say that the majority opinion in the Schwinn case enjoys the bubious distinction of having become one of the most widely criticized decisions ever handed down by the Supreme Court. In my estimation, the only thing clear about the Schwinn decision is that it and its progency have generated far more

In any event, the vertical restrictions in the soft drink industry are clearly distinguishable from the vertical restraints found to be unlawful in Schwinn. Schriun involved restrictions on distributors of bicycles, the finished products of the trademark owner, whereas the soft drink territorial franchises involve the use and application of the syrup companies' trademarks to packaged soft drinks manufactured by licensees. Schwinn did not involve a trademark licensing arrangement where control of quality and uniformity of the product manufactured by the hottler licensee are deemed by law to be crucial to the protection of the mark, 4 but a significantly different factual situation. Schwinn was concerned with a trademarked product manufactured by the trademark owner and sold or consigned to its customers in completed form. In Schwinn, the manufacturer's dealers and distributors were simply reselling Schwinn's branded goods and not applying its trademark. To the contrary, trademark licensing always presents hazards to the mark's validity and calls for a degree of supervision and control which is unnecessary when the trademark is used exclusively by its owner, as in Schwinn, and applied by him to his own goods. Thus, quality control of the trademarked products was not an important factor in the *Schwinn* situation as it is in the soft drink business where the trademark owner sells an ingredient to its licensees which is used by them in preparation of the bottled soft drink sold under the licensol trademark. Obviously, in the latter case, where the trademark owner does not itself complete the manufacture of the trademarked product, and particularly where the licensee is making a food product, quality control becomes not merely a significant but a vital consideration. Indeed, in gauging the reasonableness of restraints imposed in franchise agreements granting a trademark license, the decided cases have uniformly upheld the legality of reasonable territorial restraints ancillary to trademark licenses. The right, and indeed the duty, of a trademark owner to oversee the uses of its trademarks was clearly enunciated in Denison Mattress Factory v. Spring-Air Company, 308 F. 2d 403 (5th Cir. 1962), where the court upheld vertical territorial

<sup>&</sup>lt;sup>13</sup> See also Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F. 2d 398 (2nd Cir. 1968), cert. denied, 393 U.S. 938 (1968).

<sup>&</sup>lt;sup>18</sup> See also Janel Sales Corp. v. Lanvin Parjams, Inc., 505 F. 2d 508 (2nd Ch. 1968), Cert. denied, 393 U.S. 938 (1968).
<sup>18</sup> Under the Lanham Act. a trademark owner must control the quality of the goods sold under his mark and must supervise its use to avoid the mark's losing its significance as an indication of origin. If he fails to exercise the necessary controls, his mark is subject to loss by abandonment. Lanham Act, 15 U.S.C. § 1127 (1970 ed.).

restraints violated § 1 of the Sherman Act, the court noted that division of licensed to use the mark on their own products manufactured in accordance with standards specified by the licensor. In rejecting plaintiff's claim that such restraints violated § 1 of the Sherman Act,t he court noted that division of territory was not the central purpose for such restraints, and held that such ancillary restraints were validly imposed to protect trademark rights.

As the Fifth Circuit recognized in the Denison case, unless the trademark owner is permitted to impose restraints needed to assure that his licensees will produce and market effectively a quality product, the value and validity of the trademark itself will be placed in jeopardy and possibly even lost. None of these considerations were important in Schwinn for the simple reason that Schwinn involved the sale and distribution of already completed goods. It was not a trademark licensing case and is not determinative of the lawfulness of restrictions ancillary to soft drink trademark licensing agreements. Historically, licensing arrangements involving the use of a capital asset, namely a trademark, have been governed by the rule of reason and the doctrine of ancillary restraints.

In summary, therefore, I consider that the legislation before you, if enacted, would not overturn the Schwinn decision, which I do not think can any longer be interpreted as establishing a per se prohibition against all vertical territorial arrangements, and which, furthermore, had no concern with trademark licensing

arrangements.15

I should point out that the Schwinn Company, following the decision against it. promptly moved to vertically integrate its distribution arrangements, thereby accomplishing the same objectives but at the expense of a number of its independent distributors who were forced to give up their distributorships. This result was not considered by the Supreme Court nor by the Justice Department in the case itself, the Justice Department having summarily dismissed any possibility that the Schwinn Company could or would integrate forward into distribution channels to legitimately accomplish the same effects that it had achieved with vertically imposed territorial restrictions. The Solicitor General, in his brief to the Supreme Court, noted:

". . . to accept a threat to integrate as a defense to the charge of unreasonable restraint of trade here would be to condone a demonstrated anticompetitive practice on the basis of an entirely remote possibility that the defendant might impose a similar restraint by lawful means." (Brief for the United

States at 50)

62 372 U.S. at 263 (1963).

As noted above, immediate forward integration by Schwinn took place promptly

after the decision of the Supreme Court in that case.

Further, with regard to Schwinn, I think you might find it of interest that the new Assistant Attorney General for Antitrust, Mr. Kauper, in an article appearing in the Michigan Law Review (67 Mich. L. Rev. 325 (1968)) expressed some serious doubts about the validity of that decision. I quote from page 340 of that article:

"Schwinn's restraints upon purchasing distributors and retailers were similar to those before the Court in White Motor. In that case, which came on motion for summary judgment, the Court refused to apply a per se rule to the restraints, explaining that it did 'not know enough of the economic and business stuff out of which these arrangements emerge to be certain of their purpose and effect.'62 Yet in Schwinn, the Court seemed to hold that all agreements placing customer or territorial limitations upon purchasing retailers are per se violations of the Sherman Act. What then became of White Motor? White Motor was cited in support of the Court's per se rule. Perhaps by the time Schwinn was decided the Court did know more of the purpose and effect of such arrangements, but this was not demonstrated. The Court's holding rested on the common-law rule against

the court of Appeals stated, among other things: "The United States Supreme Court has not declared that all territorial limitations automatically violate the Sherman Antitrust Act. In United States v. Topico Associates, Inc. [1972] Trade Cases v. 73,904], [1972] 405 U.S. 596 [31] L. Ed. 2d 515.—... 92 S. Ct. 1126], the Court differentiated between horizontal territorial limitations, which it declared to be automatic antitrust violations, and vertical territorial limitations, which it declared to be automatic antitrust violations, and vertical territorial limitations which validity remains subject to a rule of reason. . . It is possible that relevant factual distinctions between the food service industry and the bicycle industry in Schwim may justify exclusivity of territory for delivery of product, For example, speed of delivery, quality of product, and condition of product at time of delivery may be factors which under the rule of reason could justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance." 1972 Trade Cas. v. 74,090 at 92,486 (2d Dist. June 15, 1972). U.S. at 263 (1963).

restraints on alienation, a rule without necessary relationship to anticompetitive effect and as much available in White Motor as in Schwinn. Recognizing that this common-law rule afforded no basis for condemnation of Schwinn's contractual arrangements placing similar restraints on consignees or agents, the Court next concluded that these restraints were not only not per se violations, but were entirely lawful on the record before it. The Court's distinction between agency and sale brought Schwinn into apparent conflict with Simpson, where the Court seemed to say that the application of antitrust rules is in no way dependent upon such a distinction. To be sure, Simpson emphasized that dealers had been 'coerced' into the consignment; such coercion was apparently lacking in Schwinn. The dealers in Simpson handled no competing products; Schwinn's dealers did sell other bicycles. And, Simpson involved price-fixing. But the Court in Schwinn made virtually no effort to distinguish Simpson. The result in Schwinn may well be sound, but the Court's own explanation, together with its treatment of White Motor and Simpson, puts the matter in doubt."

If the legislation before you is enacted, as I hope it will be, I believe that the Congress will be rendering a truly valuable service by setting guidelines to be followed by Government agencies and by the Courts with respect to enforcement of our antitrust laws. Beyond question the uncertainties surrounding vertical territorial arrangements have imposed great hardships on businessmen, especially the bottler members of the soft drink industry who have operated under such arrangements in total good faith for many years and have suddenly been faced

with the prospect of destruction of their businesses.

The recent decision of the Supreme Court in the United States v. Topco Associates, Inc., 405 U.S. 596 (1972), I think has brought sharply into focus the

need for Congressionally established antitrust standards.

The opinion in that case was delivered on March 29th of this year. It involved a nonprofit, marketing corporation owned and controlled by its member supermarket chains who were given licenses to distribute the trademarked Topco products in their areas. The arrangement involved clearly is a horizontal one. The majority of the Court concluded that such a horizontal restraint is a per se violation of § 1 of the Sherman Act. The Court conceded that it was entirely possible that the arrangement may in its overall aspects have fostered competition rather than limited it, but said that it was unable to weigh the competitive forces involved and therefore established a pcr sc rule. The Court went on to say:

"There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision which must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data which would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." (405 U.S. at 611-12)

Further, Justice Blackmun, who concurred in the result, made the following

observation:

"The conclusion the Court reaches has its anomalous aspects for surely, as the District Court's findings make clear, today's decision in the Government's favor will tend to stulfify Topco members' competition with the great and larger chains. The bigs, therefore, should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest. The per sc rule, however, now appears to be so firmly established by the Court that, at this late date. I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation." (405 U.S. at 612–13)

And, finally, Mr. Chief Justice Burger, who dissented, made it very clear that he felt that the courts should not abandon difficult economic determinations and

I quote from his opinion:

"The issue presented by the antitrust cases reaching this Court are rarely simple to resolve under the rule of reason; they do indeed frequently require us to make difficult economic determinations. We should not for that reason alone, however, be overly zealous in formulating new per se rules, for an excess of zeal in that regard is both contrary to the policy of the Sherman Act and deterimental to the welfare of consumers generally. Indeed, the economic effect of the new

rule laid down by the Court today seems clear: unless Congress intervenes, grocery staples marketed under private-label brands with their lower consumer prices will soon be available only to those who patronize the large national

chains." (405 U.S. at 624).

In this connection, I would like to make one further point. The memorandum submitted to the members of Congress by the staff of the Federal Trade Commission states that the economics of the industry will be examined and the matter objectively presented, and that both sides will be heard on the economic issues. Nevertheless, the entire legal portion of that document, marked "Appendix A", is devoted solely to the contention that the vertical arrangements in question are violations of the antitrust laws. If the Commission staff so strongly believed this, I find it hard to understand why they went to such great length to emphasize that they intended to discuss the economies of the industry. One can only assume that they too had major reservations about the applicability of the Schwinn decision. Now it seems that they are taking a revised approach. In a Motion for Partial Summary Decision and a supporting Memorandum filed by complaint counsel in various of the cases which have been brought against the franchise companies, and which was mailed to respondents' counsel on July 31, 1972, just a few days ago, the Commission staff is now urging a summary decision on the issue of the vertical territorial arrangements involved in these cases, claiming that they are per se violations of the FTC Act, and proposing hearings thereafter for a determination of the relief to be granted. The type of relief they are proposing is outlined in great detail in the supporting Memorandum submitted by complaint counsel, Before I give you my views on this latest move by the Commission staff, however, I would like to discuss, in detail, the legislative proposals before you and then return to the subject of the July 31st Motion and Memorandum.

I shall use for this purpose S. 3133, which is representative of the legislation which we believe would be best suited to the objectives we are urging the Congress to achieve. In substance, S. 3133 provides that nothing contained in the Federal Trade Commission Act or in any of the antitrust acts shall render illegal a trademark licensing arrangement containing a territorial restriction provided

the following conditions are met:

(1) The licensee is engaged in manufacture as well as distribution and sale

of a trademarked food product.

(2) The product in question is in free and open competition with products of the same general class manufactured, distributed and sold by others.

(3) The licensee is in free and open competition with sellers of other products of the same general class, and

(4) The licensor retains control over the nature and quality of the licensed product.

As you can see, the concepts of the legislation are simple and straightforward. The standard which would have to be met by the artitrust enforcement agencies is merely that territorial arrangements covered by the legislation must be viewed in the context of the market in which they operate. I want to emphasize that there is no effort here to make such territorial arrangements legal regardless of the economic conditions of the marketplace. Under the legislation, if enacted, the Commission or the Department of Justice would be perfectly free to proceed in a given market to prove an absence of competition among products of the same general class. In all sincerity, I cannot see why such a standard would impose any undue hardship on the Government agencies concerned. It is a longstanding

pattern of antitrust enforcement which has worked well.

Per se rules have their place, but I do not have any doubt that their imposition with respect to vertical territorial arrangements flies in the fact of sound economics, and, in the case of these small businesses, sound antitrust enforcement policy. Moreover, as I have mentioned several times during my presentation, the soft drink industry cannot withstand the long uncertainty which would result from the five to seven years it would take for the litigation to be concluded. It is totally unreasonable for the bottlers of this country to be subjected to these uncertainties in a proceeding which is founded upon premises which are fundamentally wrong. I might also say that during the preliminary proceedings which have taken place with respect to the litigation the Federal Trade Commission has opposed the participation of the bottlers in the litigation as respondents, so far successfully. The Commission would rather allow individual bottlers who wish to protect their interests to do so by granting them permission to intervene. This is something like wanting to have your cake and eat it too. If substantial rights of the bottlers are being jeopardized by the soft drink litigation, it is hardly proper to avoid protection of those rights on the ground that full bottler participation may cause inconvenience. The enjoyment of substantial rights necessarily entails a commensurate responsibility to defend those rights. The alternative is, in essence, a default judgment. Due process requires that an absent person whose rights and interests may be adversely affected by the outcome of a judicial or administrative proceeding be given the opportunity to participate in that proceeding as a party. It is all very well to say that some bottlers will be allowed to intervene in the soft drink litigation, but the Commission's attitude is such that it is highly probable that only a token number will be allowed to do so. On top of everything else, therefore, the bottlers' livelihoods, businesses, and futures are in jeopardy and they aren't even able to be heard.

V.

I am sure it is readily apparent that as matters now stand many members of the soft drink industry are confronted with a genuine prospect of extinction. The Federal Trade Commission staff has repeatedly suggested that the pending proceedings will be a boon to small bottlers who will be enabled to grow by expanding into neighboring areas. This notion is fanciful, to say the least. For the small bottler, who is probably "inefficient" by FTC standards and is hemmed in by larger neighbors, opening up the territories will create a danger of loss of his largest accounts to his more substantial neighbors. The large bottler has the advantage of higher volume production and would probably be interested in his neighbor's large volume accounts simply to spread his overhead. Usually the big city bottler enjoys greater proximity to chain store warehouses and has a decisive advantage in getting this business. Having lost these large accounts, the small bottler will be hard pressed to realize profits by serving the smaller, less profitable accounts which have been left by the bottler shipping into his territory. Once he has lost a large part of his volume, the small bottler cannot recover by raising his prices to the remaining accounts, nor could they remain competitive at the retail level if they paid higher prices than the chain stores.

Not only will the bottler's ability to conduct a profitable enterprise be impaired, but the value of his investment in his business is in jeopardy. Credit for capital expansion by the small bottler is bound to be adversely affected and the sale-ability of his franchise materially reduced. These effects are far from speculative. There exists only a limited demand for product, and, as certain few bottlers capture the high volume accounts, others—probably the small bottlers—will suffer a disastrous loss of volume. The study by Cresap, McCormick and Paget clearly demonstrates that, depending upon the extent of volume shifting to other bottlers, between seventy-five and ninety-two percent of the bottlers

studied by them would no longer be able to operate profitably.

Another potential adverse effect of elimination of the territorial provisions would be the loss of entire franchises. It has been claimed that, depending upon the terms of specific franchise agreements, elimination of the territorial provision may effectively destroy the consideration upon which the franchise agreement is based—because the bottler's responsibilities are linked to the territorial grant. Thus, some bottlers may be faced not only with the loss of territorial protection, but also with the complete loss of their franchises—thereby nullifying in many cases what have been considered to be legally perpetual arrangements.

Against these almost certain damaging effects, the Commission staff has posited some rather dubious values which, they allege, would follow from dissolution of the territorial system. Thus, we are asked to believe that chain stores will pass on to consumers whatever savings they may realize from lower wholesale prices. To accept this premise we would have to believe that chain stores are willing to lessen the price differentials which they maintain between branded products and their own controlled brands of soft drinks and thereby suffer volume losses on their own brands. Frankly, I find that hard to believe. Generally speaking, chain stores price branded soft drinks at the prices prevailing in the locality, and discount only to the extent to which they pass on the bottlers' discounts to them when there are "specials." The chains consistently favor their controlled brands by giving them choice shelf location and disproportionate shelf space, while the faster selling brands are relegated to proportionately less shelf space. The chains' discrimination in favor of their own brands is well known in connection with other food products, and there is no reason to expect that they would price branded soft drinks to levels close to their own brands.

We are also asked to believe that through the alchemy of central warehousing, soft drinks will arrive on the independent grocer's shelf at lower prices. I find the staff's reasoning far from compelling. Even assuming that central warehouses could get soft drinks to stores at lower costs, it would seem that inclusion of a couple of soft drink brands with a myriad of other grocery items from a single source would lessen price sensitivity. Under the present system several bottlers compete aggressively for shelf space and location in the store, and their prices are highly sensitive. In contrast, one might expect that when soft drinks represent only a few among many products delivered by a single source, price sensitivity will be lessened. Moreover, it is highly problematic that grocery distributors are going to want to warehouse and otherwise handle a broad line of soft drinks—which raises alarming questions of possible unfair advantages for some brands and substantial barriers for others.

The Trade Commission staff, in its statement to the Congress, has made it absolutely clear that they are urging the insertion of another link in the chain of distribution of soft drinks, and that wholesalers instead of bottlers should provide soft drink products to retailers on the very uncertain theory that such an arrangement will provide cost savings to such retailers who, in turn, will pass on these savings to the consumer. The Commission staff conveniently overlooks the fact, as I mentioned earlier, that such wholesalers would undoubtedly carry, at most, only a few brands of soft drinks, as they now do with

respect to other food products.

If this is not a major effort to restructure the soft drink industry I do not know what is. For nearly sixty years the Federal Trade Commission has been concerned that the corner grocery store continue to exist, and that the chain store not secure overwhelming power; yet the entire thrust of their proceedings is aimed at the destruction of the small bottler businessmen who have built their businesses on the basis of serving small communities, corner grocery stores, filling stations and the like, as well as the large chains. Yet, as I mentioned earlier, the Commission has refused to join the bottlers as parties to the litigation.

Now, as I mentioned earlier, we have a new and, if I may say so, rather bizarre, proposal emanating from the Commission staff. I have already expressed in detail my view that the vertical territorial arrangements involved in the soft drink industry do not come under any per se rule of illegality. Therefore, I do not believe it would be useful for me to comment further on this aspect

of the matter.

The Commission staff, in my opinion realizing the weakness of their position with regard to the *per sc* rule with respect to vertical arrangements, now are placing heavy emphasis, in this latest submission, on alleged horizontal agreements in the industry. It is my understanding that the vertical franchising arrangements in the industry, in general, were entered into long before companyowned plants, if any, were acquired. How then could there be a horizontal

conspiracy? None would appear to exist.

If would, however, like to address myself in more detail to this recent effort by the Commission staff to save the small bottler and the soft drink industry. I can only say that with friends such as these, the small bottlers of this country do not need an enemies. As a form of relief, the commission staff is proposing an arrangement which is so filled with inconsistencies, complexities, problems and unrealities that I find it hard to believe that it has been advanced with any purpose other than as a last ditch effort to divert the Congress from enacting

the legislation you are considering today.

¶I would like to summarize what they are proposing. Bottlers would be divided into two types—small and others. The others are defined as "metro" bottlers, namely those whose presently assigned territory encompass in excess of fifty percent of the population of a Standard Metropolitan Statistical Area that was one of the two hundred largest of such Areas in the United States as of 1970. This takes us down through the Area of Norwalk, Connecticut, which, in 1970, had a population of 120.099. Such a bottler, through orders which would be imposed upon the respondent franchise companies in the litigation (to which the bottlers generally are not parties), "shall not either directly by itself or thru [sic] its customers for resale by them, offer for sale or sell or distribute soft drink products in no [sic] area" except that of another "metro" bottler, or in a non-metro area which he presently serves. An exception is made for bottlers having less than \$2 million in annual sales. Other bottlers, presumably those whom Commission staff considers to be small, could sell into any area. This order would be in effect for ten years.

It have said earlier that the pending action proposed by the Commission staff to restructure the soft drink industry is unprecedented. When one even superficially attempts to analyze this latest maneuver, my previous comment appears to be a masterpiece of understatement. The staff is actually proposing a total, comprehensive, unprecedented, nationwide reorganization of an entire industry, without even any longer suggesting the necessity of an economic analysis of that industry. It seems clear that the Commission staff has now gotten around to agreeing that their original approach will destroy most of the nation's small pot-

tlers. They now say, on page 21 of their Memorandum of July 31st:

"Although ending territorial restrictions will not save all small bottlers it will insure that more will ultimately survive than would otherwise be the case. Without the restrictions, many small bottlers, all of whom have the ability to serve larger areas, may grow large enough to support an efficient-sized plant. The proposed metro bottler handicap remedial provision should assure the existence of many bottlers which would otherwise leave the market. Furthermore, mergers among many of the smaller bottlers would create efficient-size plants. In addition, small bottlers could pool their resources to create jointly-owned production cooperatives. For instance, many bottlers currently obtain their canned soft drinks from canning cooperatives. Assisting more smaller bottlers to survive will cause more competition and lower prices to exist than would be true in the absence of

the proposed protective provisions."

In my opinion, the remedy which they propose would make certain of the demise of the small bottler. I do not propose to attempt to analyze in detail their, as I characterized it earlier, bizarre proposal, but let me raise a few of the obvious questions that it creates. Would the suggested remedy prohibit sales to warehouses by a "metro" bottler for transshipment outside his existing territory? If not, then I see no advantage whatsoever to the small bottler. Chain stores, in general, give only thirty day contracts. Is a small bottler going to undertake the heavy investment necessary to provide nonreturnable cans of soft drinks to chain warehouses on the guarantee of a thirty day contract in the face of a larger bottler's presence in the warehouse territory? Moreover, why should a small bottler be forced to over-expand or die at the end of ten years? The answer is obvious. If the staff is proposing that warehouse sales could not involve transshipment outside of a metro bottler's territory, then the problems of policing such sales defy description.

Whether or not such transfell ment is prohibited, the thrust of this proposal can only encourage backward vertical integration by the chains which would promptly move. I believe, to the acquisition of a small bottler and then proceed to the total servicing of their warehouses and stores to the resultant deprivation of competing small businessmen who depend on the two to three thousand

small bottlers to provide them with soft drinks.

What can be the possible advantage to the public of eliminating these long-standing arrangements in the soft drink industry through the creation of an incredibity complex structure to take care of a problem which, on the evidence, does not even exist? How can one possibly determine that the result will be an improvement? In my opinion, this proposal can lead to only two results—chaos in the industry and elimination of the small bottler (and probably of large bottlers, too, when vertical integration takes hold).

I have referred to the fact that the bottlers are not even parties to the soft drink litigation. The drastic restructuring of the soft drink bottling industry which is being proposed, incredible as it may seem, would evidently be done without full participation in the proceedings as parties by soft drink bottlers.

How this can be considered due process of law escapes me.

Moreover, the Commission staff now urges that practices which are claimed to be illegal per se should be continued for at least ten years. How can these diametrically opposed propositions be sustained? If a practice is illegal per se it is deemed so pernicious that it must be halted immediately. Are we now to believe that in a given case, a remedy against a price-fixing agreement could

include its continuance for ten years?

\*I would like to emphasize one further point. In our dynamic economy antitrust laws are supposed to be applied uniformly to all business, wherher it be large, small, or medium-sized. The arbitrary and capricious singling out by the Commission staff of those sectors of the bottling industry it wishes to preserve and its decision to sacrifice small businessmen to accomplish its goals would place an even tighter straightjacket on competition in this industry than would their previously announced theories. The intent of the Sherman and Clayton Acts is the fostering of vigorous competition with no more Governmental regulation than is absolutely necessary, and this most recent proposal to vastly increase

such regulation is the antithesis of that concept.

'I came here today to urge your favorable consideration of S. 3133. This latest action by the Commission staff makes their grand design clear beyond question—control and regulation of an entire industry which has served the public well over seventy-five years. This action is unprecedented, unwarranted and clearly

against the public interest.

The extremely speculative benefits which may arise from the successful prosecution of its proceedings by the Federal Trade Commission are far outweighed by the injury which will undoubtedly result. As I mentioned earlier, the United States Supreme Court has made it increasingly clear that Congressional guidance to it in the antitrust field is necessary in the national interest. The legislation before you would set such standards in a limited area. It would not provide a wholesale exemption, but rather would set a reasonable standard, namely that territorial restrictions are valid if competition exists. If the legislation is enacted, Federal agencies could still, through legal action, invalidate such restrictions in those markets where they can show that competitive forces are absent.

There is a second, and very vital, reason why legislation is needed. The uncertainties which will result from the years of litigation may well result in the destruction of the industry even though the Government's case eventually fails. I do not for a moment believe, and I would not want to urge that you believe, that if the legislation is enacted changes will not take place in the industry, I have no doubt that bottling companies will be bought and sold. Some will fail and some will merge but this should take place in the orderly context

of the marketplace, not under the threat of extinction.

I am most appreciative of the opportunity I have had to appear before this distinguished Committee and will be pleased to answer any questions you may have.

Mr. Kinter. I am only dealing with certain portions of my statement and leaving the others to the record. I have for 3 years been counsel to the National Soft Drink Association.

I have with me two of my colleagues. On my left, my partner, Charles Ruttenberg. On my right, my associate and colleague, Mr.

Robert Green.

As some of you may know, earlier in my career I served as General Counsel to the Trade Commission from 1953 to 1959, and subsequently

as Chairman from 1959 to 1961.

My views with regard to the need to preserve small business as a vital competitive force in this country have never wavered. It is my firm opinion that if the Federal Trade Commission prevails in these proceedings it has brought against the soft drink companies, it will remove from the American scene one more major small-business-oriented industry.

We already have seen the demise of the small, independent baker; of the small, independent dairy; and of the small ice cream manufacturer. These products formerly sold by these independent businessmen are now being sold and produced by giant organizations through

central distribution facilities.

I think that the soft drink industry, through the cases brought by the Trade Commission, is confronted with the same prospect today.

In my opinion, the attitude of the Commission's staff in these cases is unprecedented. It is hard to believe, but they are urging not the continuance of small business units, but their disappearance through merger.

They have indicated in their staff documents which were submitted to the Congress that many small drink bottlers will go out of business if the Commission's proceedings are successful, and that those who

survive will have to grow by merger or otherwise.

They theorize that the losses incident upon the demise of many bottlers and the merger of others will be offset by the emergence of the practice of warehouse distribution of soft drinks. And theoretically, and I say theoretically with due deliberation, by lower soft drink prices. I have no doubt that if the Commission's staff is successful, warehouse distribution of soft drinks will become a way of life in the industry.

But I do not for a moment believe that any significant long range

price savings will result.

I would like to refer to one or two points, particularly, that Mr. Ward made. He stated that the legislation applies to all of the food industry. We do not see this. As I note on page 44 of my statement, the proposed legislation is strictly limited.

It is limited as follows: First the licensee must be engaged in manufacture as well as distribution and sale of a trademarked food product.

Second, the product in question must be in free and open competition with products of the same general class manufactured, distributed, and sold by others.

Third, the licensee must be in free and open competition with sellers of other products of the same general class, and fourth, the licensor must retain control over the nature and quality of the licensed product.

Now I can think of perhaps some bread operations to which this might apply. But the soft drink industry is a rather unique industry, and the bill as drafted is sharply limited. It doesn't, I might add, require that territorial franchise selling prevail.

It merely would legalize, under the conditions specified, existing agreements between franchisees and franchisors which involve terri-

torial limitations.

Finally, Mr. Ward refers to the fact that small bottlers will not be

the beneficiaries of this proposed legislation.

On pages 13 through 16 of my statement, I have indicated the extent to which small business truly is involved here. About 61 percent of the bottling plants are located in cities with a population of 50,000 or less.

Privately owned bottling plants according to the Cresap survey which was attached to the statement presented yesterday by Mr. Rainwater, accounted for about 93 percent of all bottling plants in the United States in 1971. Only 2 percent of the plants were owned by publicly held corporations. Franchise companies owned 3 percent of the bottling plants, and another 2 percent were owned by companies whose primary business activity is not the manufacture and sale of soft drinks.

The Commission's staff also emphasized market concentration. But, in fact, in 1967, according to the Cresap study, the four largest bottling companies in the industry accounted for only 13 percent of industry sales, and the 50 largest bottling companies had only 38 per-

cent of such sales.

Contrast this with 50 largest companies in the ice cream industry having 68 percent of sales, 86 percent in canned fruit juices, and 98 percent in vegetable juices.

Mr. Ward has also referred to the price rise which he claims will occur unless the Commission has its way, or if this legislation is

adopted.

We have indicated that about one billion dollars, or slightly more, would be added to the consumers' pocketbook if the trend to noureturnable bottles continues, and it certainly would be accelerated if

the Commission has its way in these cases.

These returnable bottles, as has been pointed out, give the consumer a real price break, the percent of returnable bottles sold has changed from 1960 to 1970 from 95.8 percent to 56.5 percent in the instance of, for example, the Pepsi Cola Co. While the percent of the more costly nonreturnables has grown from 2.5 to 49.5 percent. The increase in wholesale price is due to the switch from returnables to nonreturnables, and it should be pointed out that we are talking about the 615-ounce

There are 156 ounces in a case of 24 of these bottles, but with respect to the 16-ounce bottle, which is the present trend, the consumer gets

384 ounces. This again is a trend.

I hope, personally, that the ecologists require that more and more of the returnable bottles be used because it will help the consumer, and it will help the thousands of small businessmen in this industry who are engaged in servicing the hundreds of thousands of areas of small business-filling stations, grocery stores, delicatessens, and the like.

Now I would like to turn briefly to the question of the new position of the FTC staff. The memorandum submitted to the Members of the Congress by the staff of the Trade Commission stated that the economics of the industry would be examined, and the matter objectively presented, and that both sides would be heard on the economic issues.

But they now have filed a motion for a pretrial summary decision and in a supporting memorandum filed by complaint counsel along with that motion against the soft drink franchise companies, in the various eight pending cases, the Commission's staff in now urging a summary decision on the issue of the vertical territorial arrangements involved in these cases claiming that they are a per se violation of the FTC Act, and that proposed hearings hereafter will be granted only for a determination of relief.

The type of relief they are proposing in the supporting memorandum is indicated in great detail in the supporting memorandum sub-

mitted by the complaint counsel.

I find this proposal rather bizarre, a proposal which emanates from the Commission staff, and of course which has not either been approved by the Commission or the Examiner. The staff, in my opinion, realizing the weakness of their position with regard to the per se rules with regard to vertical arrangements are now placing heavy emphasis in

this latest submission on alleged horizontal agreements.

I will address myself in more detail to this recent effort. I can only say that with such friends as these, the small bottlers of this country do not need any enemies. As a form of relief the Commission staff is proposing an arrangement which is filled with inconsistencies, complexities, problems, and unrealities, and I find it hard to believe it has been advanced with any purpose other than as a last ditch effort to divert the Congress from enacting the legislation you are considering today.

I will summarize what they are proposing. Bottlers would be divided into two types; small and others. The others are defined as metro-bottlers, those whose assigned territories encompass in excess of 50 percent of the population of a Standard Metropolitan Statistical Area that was one of the 200 largest of such areas in the United States in 1970. This takes us down to the area of Norwalk, Conn., which

had a population in 1970 of 120,099.

Such a bottler through orders which would be imposed upon respondent franchise companies in litigation (to which the bottlers are not a party despite the fact that there is indication they will have their day in court) "shall not either directly"—and I am quoting—"by itself or thru (sic) its customers, for resale by them, offer for sale or sell or distribute a soft drink products in no area" (sic) except that of another "metro" bottler in or a non-metro area which he presently serves, and then there is an exception for bottlers having less than \$2 million in annual sales.

I have said earlier that the pending proposal by the Commission staff to restructure the soft drink industry is unprecedented. When one even superficially attempts to analyze this latest manuever, my previ-

ous comment appears to be a masterpiece of understatement.

The staff is actually proposing a total, comprehensive, unprecedented, nationwide reorganization of an entire industry without even any longer suggesting the necessity of an economic analysis of that

industry.

It seems clear that the Commission's staff has now gotten around to agreeing that their original approach will destroy most of the Nation's small bottlers. Their memorandum of July 31 says, "Although pending territorial restrictions will not save all small bottlers, it will ensure that more will ultimately survive than would otherwise be the case."

It seems passing strange to me that there is so much said about mergers and consolidations in this industry, and yet, these FTC cases

are not merger cases, Section 7 cases.

If the staff does not like consolidation in the industry, either by the syrup companies or by the bottlers, then they have a clear remedy under Section 7. There have been, if I remember, no reversals of such Government cases in the Supreme Court in the last 10 years. The law is very well set in favor of the merger amendment.

I dare say that a Government agency would find no difficulty, in appropriate cases involving mergers in the soft drink industry in

finding sympathetic courts.

In my opinion, the remedy, now proposed by the staff would make certain of the demise of the small bottler. I do not propose to attempt to analyze in detail—as I characterized it earlier—their "bizarre" proposal. But let me raise a few obvious questions that it creates.

Would the suggested remedy prohibit sales to warehouses by a metro bottler for transshipment outside his existing territory? If not, then

I see no advantage whatsoever to the small bottler.

Chainstores, in general, give only 30-day contracts. Is the small bottler going to undertake the heavy investment necessary to provide non-returnable cans of soft drinks to chain warehouses on the guarantee of a 30-day contract in the face of a large bottler's presence in the warehouse territory?

Moreover, why should a small bottler be forced to overexpand or die

at the end of 10 years? The answer is obvious.

If the staff is proposing that warehouse sales could not involve transshipment outside of a metro-bottler's territory, then the problem

of policing such sales defies description.

Whether or not such a transshipment is prohibited, the thrust of this proposal can only encourage backward, vertical integration by the chains, which would promptly move, I believe, to the acquisition of small bottlers, and then proceed to the total servicing of their warehouses and stores to the resulting deprivation of competing small businessmen who depend on the two or three thousand small bottlers to provide them with soft drinks.

What can be the possible advantage to the public of climinating these long-standing arrangements in the soft drink industry? The proposal can lead to only two results; chaos in the industry and climination of the small bottler, and possibly the large bottlers, too, when

vertical integration and the chains get in their licks.

I worked with the Trade Commission for 13 years, and I had occasion to observe the economic power of the chains. I'm also a strong supporter of the Robinson-Patman Act, which incidentally, was passed

to curb some of these economic powers.

And here we have the chains turning to the Trade Commission for relief, and the Commission, in effect, turning over an industry to the chains, an industry characterized—one of the few left—by small business.

Returnable bottles would be a thing of the past. These gigantic warehouses are not geared to handle returnable bottles. This must be done by the little routemen with his own business, and there are thousands of those working for bottlers who call upon the beauty parlor, the bowling alley, the gasoline station, and so forth, where they can handle these returnable bottles, and handle them, as has been indicated, at less cost to the consumer.

The staff now urges the Commission that practices which are now claimed to be illegal per se, should be continued for at least 10 years. How can these diametrically opposed propositions be sustained? If a practice is per se illegal, it is deemed so pernicious that it must be

halted immediately.

And are we now to believe that in a given case, a remedy against a price-fixing agreement could include its continuance for 10 years?

I would like to emphasize one further point. In our dynamic economy, antitrust laws are supposed to be applied uniformly to all

business, whether it be large, small, or medium sized.

The arbitrary and capricious singling out by the Commission staff of those sectors of the bottling industry it wishes to preserve and its decision to sacrifice small businessmen to accomplish its goal would place an even tighter straitjacket on competition in this industry than would have been done by previously announced theories.

And now, despite the fact that there are many points in my statement that I would like to spread here on the record here today, I would like to turn to some discussion of the legal situation as I see it.

And I find myself in complete disagreement with Mr. Ward, and to a great extent in disagreement with the head of—the Antitrust Division.

Incidentally, Mr. Kauper, and as I indicate on pages 39 and 40 of my statement, while he was teaching, had this to say: He made

an analysis of some of the cases that are of concern to you, Mr. Chairman, and he said, "The result in *Schwinn* may well be sound, but the Court's own explanation, together with its treatment of *White Motor* and *Simpson*, puts the matter in doubt."

He, at least, at that point, was in doubt of the precedental value

of the Schwinn case.

Mr. Chumbris. Do you mind a slight interjection?

When Donald Turner came down to be interrogated as an assistant attorney general, head of the Antitrust Division, Senator Hruska asked him one question. He said, "Are you the Donald Turner that wrote the article in the Harvard Law Review, stating certain things!"

And he said, "The same name, but two different people."

I guess that is the same situation that Mr. Kauper found himself in when he was teaching and writing. He said one thing, but now he is in a different position in the Antitrust Division.

Mr. Kintner, Well, I understand that Professor Kauper, for whom I have the greatest respect, was expressing the current attitude of his

staff and the Antitrust Division.

The Trade Commission has suggested that all territorial restrictions are illegal *per se* under the rule established in the *Schwinn* case.

In our opinion, the *Schwinn* case does not stand for such a proposition, and, if it ever did, the facts of the case are quite different from the situation at hand. Whatever rule *Schwinn* laid down is not applicable to the soft drink franchising arrangement.

Therefore, my conclusion is—and it is a deliberate conclusion, Mr. Chairman—for both reasons, the legislation before you would not

overturn any existing Supreme Court decisions.

What we are dealing with here are vertical arrangements, as opposed to horizontal arrangements. The verticals are at different levels in the market, as opposed to horizontal which are on the same level

among competitors.

The soft drink industry has not been charged, I would emphasize, with any question of monopoly or monopolization, nor are we dealing here with price fixing. The attack is clear and simple. It is aimed only at vertical territorial restrictions, which have been in existence in the industry for approximately 70 years and were approved by a District Court in the Coca-Cola case, which has been referred to previously in testimony.

Only in recent years, beginning in the late 1940's, has the Government claimed that vertically imposed territorial restrictions are illegal per se. And there were some consent decrees entered into, as I point

out.

Prior to Schwinn, the only Supreme Court decision on the matter was White Motor where a truck manufacturer was charged with imposing both territorial and customer restrictions. The Supreme Court rejected the application of the per se rule to vertical restrictions, saying through Justice Douglas that it knew too little of the reactual impact on competition.

Give the fact that White was a case of first impression as to the legality of vertically imposed restrictions, the Department of Justice, in its brief seeking affirmance of the lower court's decision which was contrary to the Supreme Court's decision in White, said, "A full inquiry into the long-term effects of territorial restrictions such as White

would be incredibly prolonged and complicated; and would, in all

probability, be fruitless."

Now, that also was the approach taken by the Justice Department in the *Schwinn* case. Subsequently, however, the 6th and 7th Circuits in two Trade Commission cases—*Snap-on Tools* and *Sandura*—applied the rule of reason approach to vertical restrictions.

The Solicitor General declined to take these cases up for review, apparently believing that they were not suitable vehicles to establish a

per se rule of illegality.

In the Schwinn case, the court held that Schwinn's vertically imposed restrictions limiting customers to its distributors and retailers—limiting the customers to whom its distributors and retailers could resell products purchased from Schwinn—violated the Sherman Act: but that under such act, Schwinn could limit distribution by its agents and consignees, where Schwinn retained the title.

It was pointed out by the Solicitor General that this was a very unlikely contingency. Yet, at the end of the *Schwinn* case this is exactly what happened. They got rid of their distributors and they integrated. And I think that is what will happen in this industry by one way or another if the Trade Commission's staff has its way, and unless this

legislation is approved by the Congress.

There is some language in Justice Fortas' opinion in *Schwinn* which suggests it can be read as a *per sc*—as promulgating a *per sc* rule. However, Mr. Fortas has a statement which I quote on page 32 of my statement, which indicates to the contrary.

He noted, also, that the Government did not contend that a per se violation of the Sherman Act was presented by the practices which

were involved in that appeal.

Subsequently, several Justices of the Supreme Court have interpreted Schwinn as a rule of reason case which did not establish a broad rule of per se illegality for all vertical territorial restrictions. Mr. Justice Douglas, in the Albrecht v. Herald case, who also concurred in Schwinn, noted that Schwinn was decided on the basis of the economics of the bicycle business, in the context of a record which elaborately set forth information as to the total market interaction and interbrand competition.

Moreover, Justice Marshall, speaking for the Court in *Topco*, a case involving a horizontal matter, on which apparently Mr. Ward relies heavily for a *per se* precedent with respect to this industry which involves vertical practices. Mr. Justice Marshall, speaking for the Court in *Topco*, was careful to distinguish between vertical and horizontal territorial restrictions, only the latter of which were held to be

per se violations of the Sherman Act.

The Chief Justice, dissenting in *Topco*, pointed out that in *Schwinn*, "the Court made it clear that it was proceeding under the rule of rea-

son, and not by per se rule."

Other courts have interpreted Schwinn as not requiring a per serule in connection with vertical arrangements and have gone on topoint out that Schwinn involved post-sale restraints on finished goods, bicycles, a product so simple in use that most ultimate consumers are children. We are not dealing with that here.

Here we have trademark licensing, quality control, and many other factors; nor do we have, as in the cases where the courts have held—

including consent settlements—where the courts have held that vertical integration is per se unlawful, do we have the price fixing, the boycott, the division of markets and all the other per se violations that seemed to accompany vertical arrangements in those instances.

Here we have no allegations of price-fixing. We have none of those indicia that have led the Courts on occasion to hold that vertical

arrangements are unlawful under the Sherman Act.

If in fact Schwinn does stand for the proposition—I do not think it does—that it established a per se rule against all territorial restrictions, then its theory is that, in the interest of efficient administration of justice, no comprehensive analysis can be undertaken by the Courts of the total economic effect of vertically imposed restrictions.

The result of such a theory would be the destruction of far more small businessmen than would be helped, the awarding of a distinct competitive advantage to the large manufacturer who can afford to integrate forward or undertake the major capital investment—necessary for consignment selling.

In my estimation, the only thing clear about the Schwinn decision is that it and its progeny have generated far more heat than light.

As I point out on page 36 of my statement, there is a vast distinction—between the Schwinn situation and the soft drink situation

involving trademarks.

In summary, I think that the legislation before you, if enacted, would not overturn the Schwinn decision, which I do not think can any longer be interpreted as establishing a per se prohibition against all vertical territory arrangements, and which, furthermore, has no concern with trademark licensing arrangements as they exist in the soft drink industry.

As I indicated, in the Schwinn case, despite the fact that the Solicitor General said that the possibility was remote when he was arguing the case, Schwinn did turn to another kind of integration. It held title to its goods, and got rid of its distributors. I think that is bad from the standpoint of this economy, and bad certainly for small business.

And now I would like to refer again to the Topco decision, which I think has brought sharply into focus the need for congressionally

established antitrust standards in this area.

That opinion was delivered on March 29 of this year. It involved · a nonprofit, marketing corporation owned and controlled by its member small supermarket chains who were giving licenses to distribute the trademarked Topco products in their areas.

Now, this was a horizontal arrangement, not a vertical one, which

we have.

The majority of the Court concluded that such a horizontal restraint is a per se violation of section 1 of the Sherman Act, and the Court conceded that it was entirely possible that the arrangement may in its overall aspects have fostered competition rather than limited it. But that it was unable to weight the competitive forces involved and, therefore, established a per se rule.

This, of course, involved small chains who were trying to fight the

larger chains.

Both the majority and the minority in that case, Mr. Chairman, suggested, recognized the inequities of having to impose a per se rule on these smaller stores that were banding together to try to fight the competition which existed at the hands of the giants in their industry.

They said, we cannot make this economic study. We cannot make this inquiry. We will have to impose a per se rule with respect to this horizontal arrangement. But the whole Court suggested that the industry turn to the Congress for relief, which is precisely what this industry is doing today.

Senator HART. What we are being asked to do is make a per se link. Why do you not buy middle ground, and let the rule of reason apply?

Mr. KINTNER. The Government indicates that it will not even make an evidenciary inquiry with respect to the rule of reason in these cases. In its motion, the staff has asked for summary judgment.

Senator HART. I am talking about what we are being asked to do. Mr. Kintner. I realize that, sir. But the industry is faced with a hard problem, and we are asking for very limited relief for this industry which is faced with a problem not only of eventually having to give up its territorial limitations, but suffer irreparable harm while litigation goes on.

I might point out, Mr. Chairman, what I think is an obvious point, but I would like to make it for the record; that the Government can still attack restraints on competition in the industry if they exist. There is adequate legal remedy in the law to attack restraints in this

industry if they are found to exist.

Our proposed legislation, which is before this committee, does nothing more than grant a very limited protection to those contracts which involve franchise territories. It does not disturb contractual arrangements that are otherwise. There must be competition even so, if you will have in mind the points which I made earlier about the conditions under which this bill is presented.

Senator Hart. Not to pursue it beyond this one further reaction. but you were reminding us that the Court was implying that its hands were tied. It could not make any determination or inquiry as to economic principles that are at work and competing claims and priority.

If I would buy the need that the Court has that freedom in that situation, why don't you, when you can understand why I wonder why proponents of this legislation would not permit the Court to have the same kind of freedom in evaluating the consequences of the territorial exclusivity.

Mr. Kintner. Well, the antitrust policy is made, in the first instance, by the enforcement agencies. They receive their signals from legislation. They are bound to enforce legislation as they interpret it and as

the courts interpret it.

When you get into a box which we have, what we are in right now, there is only one court of last resort, and that is the Congress which

fixes the policies of these laws.

I am not one who believes that an industry which has been subjected to adverse attention by government enforcement agencies should go crying in each instance to the Congress for relief. But I think that the hard cases should be examined by the Congress.

What the Supreme Court was saying in the Topco case is that was a problem so vast, it involves so much policy that it is—that that policy ought to be fixed by the Congress, rather than by the courts and the

enforcement agencies.

Mr. Chumbris, Mr. Chairman, may I interject?

Mr. Kintner. I imagine my time is up. Senator Harr. We have enjoyed it.

Mr. Chumbris. Before you leave that point. I think this might be

a point on that.

When we had the sports merger bill before us, the exemption from the antitrust laws of all four sports—baseball, foetball, basketball and ice hockey—in 1957, the Congressman Celler preferred a rule of reason in his law, in his bill; and his bill was reported out from Judiciary Committee to the floor.

When it got to the floor, Congressman Keating, who became a Senator, and three other Congressmen, including Congressman Burns of Wisconsin, offered a substitute which made it a complete exemption

from the antitrust laws.

The reason there was that if you would allow the rule of reason to apply, why you would be having all of these multiplicity of suits, where the little businessman would have to face—if the rule of reason were applied—each one. So that you would have to go to court.

Whereas, if you got a complete exemption, why then, you would bar

those suits.

Now, under the Schwinn case and the Snap On Tools that you referred to, they were part of our hearings on franchise distribution back in the middle 1960's. I recall that in Snap On Tools, the man came before us and he said, "I have to spend \$250,000 of good money for small businessmen to prove I was right," before the Federal Trade Commission.

Schwinn went before the Justice Department. They were bringing a per se violation for the same type of an arrangement, and he had already spent \$500,000 when he testified before us. And that case had not yet gone to the Supreme Court. I do not know how much Schwinn paid—spent in court costs and in attorney fees and time and everything else, in taking it all the way up to the Supreme Court.

Mr. Kintner. Mr. Chumbris, your point is well taken. The problem with antitrust litigation is that it can only be afforded by the well-off corporations, the larger corporations. It is almost impossible for a small corporation to defend itself against a major attack by a Govern-

ment agency in this antitrust area.

There is, of course, the trouble damage provision, which small business takes advantage of on occasion; but even that is sparingly used because the cost of even paving the expenses of trouble damage litiga-

tion by a plaintiff is horrendous.

I have handled some of those cases, several of them, since I returned to practice in 1961; and I have a pretty good idea of what is involved here. Where you are dealing with a rule of reason matter. Mr. Chairman, the inquiry into the field of economics is very vast and complicated, and it does not surprise me that the Supreme Court does not want to take that excursion.

Mr. Chumbris. It does help to make the lawyers rich, though,

doesn't it i

Mr. Kintner. Yes, it does. The lawyers prosper, but small business needs rules that are understandable and rules that are sufficiently particular that they do not have to spend all their money litigating to get interpretations. That is the problem in small business.

I believe in small business, Mr. Chairman. I think that small business is the very cornerstone of our economy. If we ever reach the point where an entrepreneur, an individual cannot go into small business and then into medium sized business and then into large business because of his skills, then we might just as well give up on our economy. And I am not prepared to do that, Mr. Chairman.

I think that we must preserve these small businessmen in industries where we have them in existence yet as we do in the soft drink industry. If we give them a break, we are helping both them and the economy. I do not buy this idea that you can segregate small business from medium sized business or large business, and have one set of

standards for one and another set for the other.

This isn't fair under our system either, because I have seen too many of these small businessmen grow into prosperous medium sized businessmen. There ought to be a standard that is fair for all.

I am sorry for-

Senator HART. I am glad you added that last paragraph. I thought you were going to wind up in the position of recommending an exemption from the antitrust laws for small business.

Mr. KINTNER. Not in the least.

Senator Harr. Well, I confess it. It is a difficult problem, and I do

understand the cost burdens.

Mr. Kintner. The opposition says that because we are protecting some small businessmen here, we are also going to protect some large businessmen. That does not bother me. We are protecting them all alike. If some large business is a beneficiary, then I think that is fair too.

Senator HART. I interrupted you, but have you reached the sum-

mary?

Mr. KINTNER. I have used up too much of my time, I am sure, and I

am grateful to you for your forebearance, Mr. Chairman.

I will be glad to answer any questions. I have a great many more points I would like to make, but they are made in my statement, and I would hope that those who study this matter will refer to those statements which I made.

Senator Hyrr. Your statement I have managed to get through a large part of, and all of us will make sure that we read it. It is what

we have come to expect from you.

Now, I have in front of me-but I will not play it back to you unless

vou want it—something that you wrote.

We can laugh about Don Turner and we can laugh about Professor Kauper and his Michigan paper, but what about Kintner's American Bar Association Antitrust Section paper?

Now, admittedly, that is when you, as those fellows, were wearing a different hat. Or what about Earl Kintner testifying in his role as Chairman of the Federal Trade Commission on a proposal much like

the one we have in front of us?

Mr. Kintner. I have a certain amount of sympathy for Professor Kauper in that regard. I have done four books in the field of antitrust law: Antitrust Primer, which is now going into a second edition in March: a Primer on Robinson-Patman; a Primer on Deceptive Practices; and, in March or April, there will be a Primer on Merging; and eventually one on international antitrust and on the effects of property

rights. So it would be very easy if your staff went through my writings to find something inconsistent in those writings, to say nothing of some 250 public speeches which I made during my chairmanship of the Trade Commission.

Senator Hart. Well, we dug out two.

Mr. Chumbris. Mr. Chairman, that is not as bad as the lawyer who won a case and set a precedent, and when he had another case like it and he was on the wrong side, the judge said, "How are you going to talk your way out of your own decision?"

So he was cornered much more than you are.

Mr. KINTNER. I sometimes find that a little troublesome when I am representing plaintiffs in trouble damage cases and occasionally have to defend a corporation in the same kind of litgation. We have to be very careful, and I try to be careful.

I have had a consistent role in supporting small business. Recently, within the past 2 years, we donated about \$5,000 of my law firm's time to the Senate Small Business Committee and the study they were

making on the evils, certain evils, of franchising.

I have on occasion donated other time of myself and my staff to the House Small Business Committee. So at least in that one area, if I may say so, I have been consistent, although I am sure that the staff can find some inconsistency in all these writings of mine.

Senator HART. Well, there is no more understanding audience than

a politician.

Mr. Bangert?

Mr. Bangert. Mr. Kintner, you mentioned that the Commission's case will force consolidation involving operations which are primarily family owned small business. Yet it does appear from the testimony that we have gotten that there is a trend, toward this consolidation.

Apparently a lot of it is because of the change in technology. I am wondering, isn't it inevitable that in this industry there is going to be change from the status quo in order to accommodate modern technology and modern distribution trends, and if there is, shouldn't the shifts in business be determined by the marketplace without having creeted artificial restraints which in large part permits the parent company to determine who is going to stay in business and who is not going to stay in business?

Mr. Kintner. Mr. Bangert, I recognize—I have just been through the text of a merger book which was submitted to the publisher, and I have studied the whole trend of mergers. I have got the economics of

mergers.

I have traced the history of mergers in this book, and I recognize that there has been a merger trend. I recognize that that trend has

been very pronounced in many industries.

However, I think that whatever consolidations occur in the future in the soft drink industry ought to be made on the basis of factors of the industry, the economy at that time.

In other words, a freedom of choice, and not force by the Federal Trade Commission which has an obligation, a very important obliga-

tion, of preventing mergers.

I find it wholly inconsistent for the staff of the Commission to say, "Well, there's been a merger trend, so let's accelelerate the trend." I think that's all wrong.

It is true that there have been many bottlers who have disappeared in this industry. Historically, you have material which has been submitted in your record that indicated that after World War II, for example, many of the returning veterans were given a preference for sugar quotas, and they went into the soft drink industry. Many of those who were totally unsuited for this kind of business life.

They went into it, and many of them then disappeared because of

facts that they were not geared to operate a business of this sort.

So a great number of these incentives, the record will show, and I think any study will show, disappeared after World War II—those

were just temporarily in the business.

Mr. Bangert. With regard to the section of the merger trend, you indicate that the Federal Trade Commission does still have section 7 in remedies for mergers in this industry.

Mr. KINTNER. That is correct.

Mr. Bangert. If this bill is passed, and Congress says that exclusive territories are per se legal, where there is interbrand competition, then if Coca-Cola of New York wants to merge with Coca-Cola of some-place else, how are you going to define your relevant market area since you don't have any legal competition within that area to begin with?

Mr. Kintner. Well, first of all, there are some 30 pending investigations of mergers in this industry. I don't know how many of them cover—some, I think—cover the situation you just described. But this becomes a matter of constructing a market and a submarket, and

showing injury in that market.

The market, as you well know, Mr. Bangert, may be tiny or it may be large. I am not suggesting in that situation what the answer will

be, or would be.

But there are many conglomerates who have moved into other markets who have found themselves challenged by some of the recent theories of the antitrust enforcement agencies.

I, for one, having worked in an agency like this for 13 years, have a great deal of confidence in the ability of the staff to construct theories to meet needs which have been generated by changes in the economy.

I would believe that the Trade Commission staff would be able to construct a theory on even that very hard case which you present. I wouldn't think they would have much difficulty if the major sirup companies, with this kind of legislation on the books, decided to integrate into the local manufacturing.

I don't think there would be much difficulty about stopping that, or even stopping a merger of two continuous territory bottlers unless it could be shown that there were certain defenses available, such as

impending bankruptey.

Mr. Bayerr. Well, in the case of a merger of two contiguous bottlers, again I would think there would have to be some new theory other than the present one that would cover that type of horizontal merger.

Mr KINTNER, Well. I think, Mr. Bangert, you have to examine all of the facts of that particular case which takes place in a merger

case.

What were the reasons for merger? Are they procompetitive or anticompetitive? If you had two small bottlers in an area in a State

that isn't very populous and they are locked into a franchise in their respective territories and developments in the industry require them to make huge expenditures which they are unable to do, can't each justify then, I think under those circumstances, if I were in the enforcement agency, I would look with some favor on a merger of that sort because I would think it would be procompetitive and necessary.

But I believe that adoption of this legislation by the Congress would arrest the merger trend, would discourage the merger trend. Whereas if the staff of the Trade Commission prevails in these cases, they have admitted in page after page of submittals to the Congress, they contemplate that some kind of an optimum size would be reached and

mergers will be permitted up to that point.

They point out that the remedy is to merge. I think this is bad. I think that many of these bottlers who are very, very small, as Mr. Rainwater has pointed out, are managing to make a good profit, and to exist in a small area with a limited population and limited sales, because they are selling—for example, the returnable bottles, and they can sell cheaper, and they can manage to make money. They are making money.

I don't think that a merger in that circumstance ought to be per-

mitted by the antitrust agency.

My clients may not agree with me, but I will give you my frank

judgment.

Mr. Bangert. Well, yesterday we had testimony from a small bottler that was adjacent to a large, metropolitan area, and he claims that this bill would ultimately spell his demise since his territory, as it is existing now, is not large enough to justify his taking advantages of new technologies and efficiencies.

I would assume that there probably are many bottlers like him located adjacent to large metropolitan areas, and that perhaps this

reasoning would apply to their situations.

Mr. Kintner. Is this the broker?

Mr. Bangert. No; this is the Coca-Cola bottler from Taft, Calif.

Mr. Kintner. But it is owned 51 percent by a chainstore.

Mr. Bangert. Well, it was just purchased. His testimony indicated that 51 percent was recently purchased because he had the choice of either selling out to the chainstore or going out of business because his territory wasn't large enough to let him expand.

Mr. Kintner. Well, Mr. Bangert, I will tell you this: In my deliberate judgment, if we let the chainstores get their hooks in these

bottlers there won't be very many bottlers left.

Mr. Bangert. But that's the thing, Mr. Kintner. He said he had to sell 51 percent of his business because Coca-Cola confined him to a territory that didn't permit him to make the investment and plant to make new technologies and therefore compete.

What he said is that he would have been happy to sell in competition with Los Angeles, into the Los Angeles territory, and that by profits

from those sales he could have expanded his plant.

Mr. Kintner. Well, we may have turned up one of these cases where the Trade Commission—if there were a merger, there would be a merger between the Taft ('o., which I assume is what you are referring to, and a nearby bottler.

But the Commission would say that this is justified.

Mr. Bangert. But the point is that he doesn't want to merge. He wants to maintain his own independent business. He has been a small businessman for a long time. He doesn't want to merge.

Mr. Kintner. Well, maybe he should talk to Mr. Rainwater and find out how he can exist in small territories like Mr. Rainwater does

and make a profit.

Mr. Bangert. Of course Mr. Rainwater's operation is, as I recall,

about totally they served about 2.4 million people.

Mr. KINTNER. He operates seven separate companies. Mr. Rainwater is a very talented and very able professional manager in this industry, and it doesn't surprise me that any company he takes hold of makes a profit. Maybe the Taft Co. ought to consult him on how to make a profit now in a small area.

Mr. Bangert. Well, at any rate though, again what is a guy like

Taft going to do if we pass this bill?

Mr. Kintner. Well, you can't protect every businessman against the businessman's inability to make a profit. That's for sure. Nor can you protect even small business to any appreciable extent against the inevitable changes that come from technology, population shifts, ecology, and other factors.

As I have seen industries over my 25 years as an antitrust lawyer, I have seen the profile of industries change a great deal due to customer preference, due to population shifts, due to changes in pace, due to ad-

vertising, due to technology change.

These are inevitable, and when they occur, changes occur in the struc-

ture of an industry.

But I make the point once again that it should not be the business of an antitrust agency to hasten that structure change. It should not be the business of the Trade Commission to restructure an entire

industry.

What is proposed here by the Trade Commission—and they made it abundantly clear, Mr. Chairman—is that they want the industry to deal with warehouses. The change will add their warehouses, and then they maintain that the food warehouses will now serve the soft drink to the customer.

It gets rid of the whole distribution system that consists of thousands

of thousands of routemen and run it through a warehouse.

Now, I don't think it's the business of the Trade Commission to make that determination. I think it should be made in the marketplace.

Mr. BANGERT. Well, isn't that it? Shouldn't it be made in the marketplace, and isn't what the Federal Trade Commission trying to do is to permit the natural competitive boundaries, competitive market areas, to work, and not have an artificially placed market area, many of which have been placed there years and years and years ago.

Mr. Kinther. Well, they like the warehouse. The chains like the warehouse. But what about the hundreds of thousands of small businessmen who can't buy from a warehouse. I believe they are entitled to have their current distribution system, and have it, if necessary, sanc-

tified by the Congress in legislation.

I do not believe it is any business of the Trade Commission to impose a structure upon any American business.

Mr. Chumbris. May I interject?

Mr. Bangert, Yes.

Mr. Chumbris. As I understand it, the record shows we have approximately 2,300 bottlers in the country today. Is that correct? That is the figure Mr. Ward used.

Mr. Kintner. I believe that is approximately correct.

Mr. Chumbris. And if Mr. Bangert suggested of leaving it open in order to protect one, or maybe that 10 are in position of the Taft Bottling Co.. you may leave the 2,300 open to invasion by the non-metropolitan areas where they could move in and take over.

These little companies, if they are not protected—as you point out,

you can't protect everybody.

It reminds me of when we had our baseball hearings. Mr. Finley came forth and he wanted to change the system that baseball was operating on so that he could move from Kansas City to Louisville or one of the other cities he wanted to go to, although he was protected in Kansas City from being invaded by the Chicago White Sox all these years that he was in baseball.

So when I brought that question to him, he didn't realize that he was being protected because of a rule which is what they want to do here

by law.

Mr. Kintner. I agree, Mr. Chumbris. As a matter of fact, the Taft Co., wants its freedom. But I represent, through the National Soft Drink Association, about 3,000 other people who don't want their freedom.

So it depends, I guess, on which side the ox is being gored.

Senator HART. That describes most problems we are confronted with.

Mr. Kintner. It sure does, sir; and I sympathize with you and the other Members of this Congress on some of the difficult problems you have to resolve here.

Mr. Bangert. One last area that I would like to cover, and again it does go to this idea of whether we are protecting small business

or not.

In 1971 or 1972, Soft Drink Industry reported that Coca-Cola and Pepsico brands together accounted for more than 57 percent of all soft drink consumption, and these two franchises have total sales of \$2.9 billion, and are the largest soft drink bottlers in the country.

Won't this legislation entrench this type of concentration?

Mr. Kintner. I don't think so. I have referred in my statement to the growth of some of these independents against the so-called giants.

For example, in recent years, as I point out in page 9 of my statement, numerous regional brands have been able to expand into new markets. Between 1970 and 1971. Ma's Old Fashioned, Inc., increased its franchised plants from 47 to 67, and No-Cal Corp., increased its franchises from 14 to 40.

There are many other similar examples. This entry into new markets has been in part responsible, I point out, for the dramatic growth in

sales of small companies.

Nesbit from 10 to 84 million cases between 1964 and 1970. Dad's

from 3.5 to 28.5 million cases, to name just a few.

Similarly, new products, diet soft drinks have been introduced in recent years, and I might add that the lime-lemon people haven't done so badly in recent years against the colas. They picked up the "uncola"—at least Seven-Up did—and turned it into a sales tool.

There is a lot of competition, and I think if we leave the franchise system intact that this will permit many new future brands to come into the market and to take their place and to generate vigorous

competition against the present major brands.

Traditionally, Mr. Bangert, these little brands—Seven-Up is a good example-Dr. Pepper is another example, and they have done very well, both of them-they relied upon the franchise system, the exclusive franchise system, in order to convince people to invest their few thousands of dollars in the bottling operation in a particular territory in order to encourage small business bottlers to promote

what was once a new product.

They had to have the protection of that franchise because in most instances it may have been all the family's fortune that was put into this new business. They needed that protection, and it is precisely this kind of situation, if permitted in the future, that will permit other competitors of flavors and sirups to move into the market, to secure franchisees in various territories, to promote their product nationally through advertising, to secure consumer acceptance, and thus to get their share of that market.

It has to dwindle so far as the majors are concerned because that's the whole story of competition in our capitalistic competitive economy.

Mr. Bangert. Well, I think Professor Turner, when he was Assistant Attorney General in charge of the Antitrust Division, when we held hearings on legislation similar to this, did indicate that that was the one area where he saw the necessity for maintaining exclusive territorial allocations, and that was to help a new guy get into the business.

I assume that if we were talking about the legislation 25 years ago, or 40 years ago with respect to some of the well established companies, it might be applicable because at that time they would have been in the process of breaking into the business

Mr KINTNER. Well, who is going to be the Solomon that is going to say, "How new is new?" and "How big is big?" and "How small is

small?"

Mr. Bangert, Maybe we should pass legislation saving that if any new soft drink bottler comes along, why they can have a per se legal exclusive territorial allocation until they grow big enough.

Mr. KINTNER. I hope you are kidding, Mr. Bangert. I think that

would be unconstitutional.

Mr. BANGERT. I have nothing further of this witness.

Schator Hart. Mr. Chumbris?

Mr. CHUMBRIS. All the questions I had you have already answered.

Senator HART. Mr. Kern?

Mr. Kern. I have no questions.

Senator HART. Thank you very much.

Mr. Kintner. Mr. Chairman, it is always a great privilege to appear before you, and I again thank you for that privilege.

Vr. CHUMBRIS. You're not a bad politician yourself.

Mr. Kintner. He's a great man in my book, and I would like the record to show it.

Senator Hart. We are adjourned to resume in this room at 8 to-

morrow morning.

(Whereupon, the hearings were adjourned at 1:35 p.m.)

## EXCLUSIVE TERRITORIAL ALLOCATION LEGISLATION

#### THURSDAY, AUGUST 10, 1972

U.S. Senate,
Subcommittee on Antitrust and Monopoly,
Committee on the Judiciary,
Washington, D.C.

The Subcommittee on Antitrust and Monopoly convened in room 2228, New Senate Office Building at 8 a.m., Hon. Philip A. Hart presiding.

Present: Senator Philip A. Hart.

Staff Present: Charles E. Bangert, general counsel; Peter M. Chumbris, chief minority counsel: Dr. Arthur Anderson, economist; Charles E. Kern II, minority counsel; Patricia Bario, editorial director; and Janice Williams, clerk.

Senator HART. The committee will be in order.

This morning we welcome a colleague who has evidenced a very deep concern that the legislative response to the problem that we have been discussing for several days be developed so as to help the smaller businessman. I am delighted to have the opportunity to recognize that concern and to welcome Senator Clifford Hansen of Wyoming.

### STATEMENT OF SENATOR CLIFFORD P. HANSEN OF WYOMING

Senator Hansen. Thank you very much, Mr. Chairman.

I want to express my gratitude to you and to members of your committee for scheduling these hearings. It is a privilege to be here to testify in support of S. 3133.

Mr. Chairman, I am not sure how much time you have but if I could ask permission that my entire statement, which consists of four pages.

be included in the record.

Senator HART. It will be printed as though given in full. Four pages come well within the rule which we are trying to apply—15 minutes. (The document follows:)

#### STATEMENT OF SENATOR CLIFFORD P. HANSEN

Mr. Chairman, I am grateful to you and the members of your Committee for scheduling these hearings. It is a privilege to be here to testify in suport of S. 3133.

The soft drink manufacturers in my home state of Wyoming are extremely concerned about the action by the Federal Trade Commission against their franchise system. Not only do I share this concern, but I am convinced that unless this Subcommittee acts upon the pending legislation, the prospects of even one of Wyoming's ten soft drink manufacturing operations surviving are extremely remote.

I first contacted the staff of the Federal Trade Commission in March of 1971 concerning the prospects of complaints being issued against seven of the nation's

soft drink firms for violation under the antitrust laws.

Since that date, I have written several times to the Commission staff. I have been constantly amazed at the apparent indifference to this problem exhibited in their return letters.

I presume this almost callous attitude exhibited by the FTC personnel culminated on April 3, 1972, with the publication by the FTC staff of a booklet

opposing Federal legislation similar to S. 3133 and S. 3040.

Apparently the staff of the FTC felt compelled to undertake this type of lobby because of the growing Congressional support for the legislation the Committee is considering today.

Mr. Chairman, this legislation does have wide support. As I understand it, there are over forty Senate co-sponsors. This support demonstrates the wide concern that has been expressed by soft drink manufacturers throughout the nation

over the action of the FTC.

The reason for this is simple. If these complaints are successful, it will spell the death for the vast majority of the franchises in this nation. As I indicated before, with regard to my home state of Wyoming, I doubt that a single operation in Wyoming could survive the economic competition resulting from a breakdown of the franchise system for soft drink bottlers.

Mr. Chairman, I realize that this Committee has heard considerable testimony from several large franchise owners. As has been brought out in the questioning of these witnesses, the action of the FTC would not greatly affect this type of

operation.

We have no large soft drink operations in Wyoming. I understand that nation-wide about fifty percent of the bottling plants employ less than twenty persons each. It is this type of operation for which I am concerned. It is this type of operation that will be protected by this legislation, and it is for this type of business that I am appearing today.

Unless some relief is granted of the type contemplated in the pending legislation, Wyoming will be served from some large operation in Denver, Salt Lake

City, or Seattle.

The demise of the soft drink bottlers in Wyoming and the rest of the nation would not be the only casualty. A secondary aspect of this legislation is just as important. The question which should be in the mind of every drug store, small grocery store, and service station owner in rural and suburban America is how they will get their soft drinks if the franchise system is broken down and the local bottler is destroyed. The personal service which has characterized the soft drink industry from its inception will undoubtedly be eliminated.

The large bottler in metropolitan America will capture the large super market outlet by pure economics. The local bottler will be left to the small and medium size outlet. In an area such as Wyoming, a bottler simply cannot provide the service to the ordinary business outlet unless he is able to service the larger account. The ultimate conclusion can only be that there are an awfully lot of small business outlets that will have difficulty getting serviced unless the local

franchisee is protected.

Wyoming, as you know, is an area of low population with relatively long distances between small population centers, which means that the individual distributor of a soft drink must carry his product for many miles to service the public. There are many small towns in Wyoming that are supplied with soft drinks as a service to the public, rather than on an economical basis.

By the same token, there are some outlets in Wyoming that are profitable, and a distributor might sell a hundred cases of soft drinks a week to this type of operation. It is true there are very few of this type of outlet in any given area, but those that do exist help to subsidize and make profitable the service to the

uneconomical outlets.

There are those who would justify the action by the FTC because of the prospects that consumer prices will be lowered. This is an extremely short-range view; because once the small bottler is put out of business, there is nothing to keep the large distribution firms from hiking up the price with the eventual result being that it will cost more for the consumer.

Permit me to make one further point in this regard. I can visualize the situation in which only the small soft drink operation such as we have in Wyoming would be immediately affected by an elimination of territorial restrictions. But, as time passes and the larger operations exert more and more economic pressure on bottlers outside the urban centers, one after another soft drink franchise would be forced to sell or merge.

The end result would be a true monopoly situation. I think that this is exactly what this Committee would like to guard against. It is axiomatic that this course

of action is endorsed by the Federal Trade Commission which has been estab-

lished to prohibit this type of thing from occurring.

Mr. Chairman, there are those that discount the hypothesis that a great number of franchises will be put out of business unless some action is taken to potect terrritorial restrictions. One need only look at the situation with the local dairy operations to realize what will happen to the soft drink franchise. I am sure the Chairman can well remember the numerous local dairy businesses which were so prevalent in every community until after World War II. With the advent of increased technology in transportation, as well as the establishment of super markets and chain stores, the local dairy in nearly every case simply went out of business or was forced to merge with the competition. I don't want to see this happen to the soft drink franchise.

As was the case with the dairy operations, the soft drink franchise today is characterized by numerous small plants all over the nation making substantial contributions to local and state communities; purchasing local goods,

employing local personnel, and serving local needs.

I am a co-sponsor of the legislation this Committee is considering today

because I want to see this type of small business continue.

I recognize that there is a fight pending in the courts over whether or not there has been an actual violation in this case. Nevertheless, I hope that the Committee will act favorably on S. 3133. The soft drink franchise owner has already been placed in a very tenuous situation because of the uncertainty of the value of his contract with the motor company by the action of the FTC. There is no doubt that some operations simply could not weather the storm resulting from the delay for this matter to get through the courts.

Mr. Chairman, let me express my appreciation to you once again for holding these hearings and allowing me to testify. I am convinced that enactment of S. 3133 is in the interest of business, as well as the consuming public. The soft drink franchise system has historically worked to the benefit of the public,

and I urge the Committee's favorable consideration.

Senator Hansen. In that case, I will just go ahead with my statement.

The soft drink manufacturers in my home State of Wyoming are extremely concerned about the action by the Federal Trade Commission against their franchise system. Not only do I share this concern, but I am convinced that unless this subcommittee acts upon the pending legislation, the prospects of even one of Wyoming's 10 soft drink manufacturing operations surviving are extremely remote.

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The reason for this is simple. If these complaints are successful, it will spell the death for the vast majority of the franchise in this Nation. As I indicated before, with regard to my home State of Wyoming,

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Unless some relief is granted for the type contemplated in the pending legislation. Wyoming will be served from several large opera-

tions, such as in Denver, Salt Lake City, or Seattle.

Senator Hart. That, Senator, answers the question which I whispered to staff, that you were testifying. I was just curious as to if Wyoming sources evaporate, where you anticipate service would come from.

Senator Hansen. Mr. Chairman, by having identified the three cities, Denver, Salt Lake, and Seattle, I don't mean to say that there may not be one or more cities relatively as close to Wyoming as Seattle, which could pick up our business in there, but I think that clearly the economic situation that we anticipate would result in this type of operation.

The demise of the soft drink bottlers in Wyoming and the rest of the nation would not be the only casualty. A secondary aspect of this legis-

lation is just as important.

The question which should be in the mind of every drugstore, small grocery store, and service station owner in rural and suburban America is how they will get their soft drinks if the franchise system is broken down and the local bottler is destroyed.

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Senator HART. Again, thank you, Senator, for—especially at this hour of the day—dramatizing the concern which you have and which reflects, I know, the concern of these franchisees in Wyoming.

And I suspect that Wyoming and States like it, where, as you say, the population is relatively small and the distances between people relatively great, are the ones which most strongly anticipate disaster

if there are no steps taken.

Senator Hansen. Mr. Chairman, I think we do have a great many small outlets that are not appreciated by the public. It has been observed that the population per square mile in Wyoming is about 3½ people, and one man said he had traveled over several square miles

and had not yet found 3½ people.

But nevertheless, there are lots of places that the public does appreciate being able to stop to buy soft drinks and I am confident would have no way at all of being served by the soft drink industry. It would be their responsibility to go to a large supermarket or to some other large outlet and purchase their needs and as a consequence I think there is little doubt there would be a much smaller offering of soft drinks to the public under that situation than is presently the case-

I do appreciate your interest.

Senator Hart. I appreciate yours. I wish we were all living before the wheel had been invented. Maybe these problems of competing claims would be simpler. I am not even sure of that.

Thank you very much.

Senator Hansen. Thank you.

Mr. Chumbris. Mr. Chairman, I just want to make one statement. The fact that Senator Hansen is here in the interest of this bill, indicates it is a bill that cuts a cross-section of the entire country. We have 36 to 40 Senators who are on this bill; they are Republicans, Democrats, liberals, moderates, conservatives, some from big States, some from small States, which indicates a good cross-section, and it is the type of thing where Senators are called upon to help a particular problem, even though the national policy may be not to grant too many exemptions to the antitrust laws.

In this case, is to meet a need, just like Congress met the need on the Agnes hurricane, and Congress meets needs for other things around the country, and it is good to have you come in, Senator, and

to bring us so forcefully the great need for this bill.

Senator Hansen. I appreciate that observation. I might add that with the increasing concern about our environment and our drive to clean up litter. I think there is another aspect to this action by the FTC that is frightening if we were to move in the direction as clearly

indicated by the action so far of the FTC.

My guess is that we would see a great many more bottles or cans disposed of along highways than is now the situation and I think that is something that we ought not be insensible to also. Because the personal service aspect of soft drink marketing would be eliminated, the returnable bottle would become the exception rather than the rule.

Senator Hart. Thank you again.

Our next witness this morning is Mr. Thomas J. Heckenkamp from H & M Sales Co., Monterrey Park, Calif.

Mr. Heckenkamp?

# STATEMENT OF THOMAS J. HECKENKAMP, H & M SALES CO., MONTERREY PARK, CALIF.

Mr. Heckenkamp. Thank you.

Good morning. I am Thomas Heckenkamp of Los Angeles, Calif. I operate my own small business as a food broker and distributor in the Los Angeles area. As brokers, we represent manufacturers and distributors of food products and other items sold in foodstores.

We supply sales and marketing services to suppliers who want access to the Los Angeles grocery store market but who lack either adequate personnel or knowledge of that market. As distributors, we buy and

sell products for our own accounts.

Much of our business involves regular and close contact with buyers for the grocery chains and for the grocery-buying cooperatives in which small stores pool their buying power to take advantage of quantity discounts.

We also deal with buyers for the regular wholesale grocery supply houses. Our service is based on our knowledge of the Los Angeles market and our understanding of what the grocery buyers want and

need to do their jobs successfully.

The large grocery chains operate their own central warehouses. They supply their stores by assembling each store's requirements at the warehouse, and making regular deliveries to the store. Instead of a lot of suppliers' trucks backed up behind each store trying to unload at the same time, there is one truck from the warehouse carrying exactly what the store needs.

The merchandise is handled by store employees who know how much of each item is needed on the shelves and where it is needed, rather than by truckdrivers or route salesmen whose aim is to get as

much shelf space as possible for their product.

The grocery-buying cooperatives and the independent wholesalers supply the smaller nonchainstores in the same way the chains supply their stores. Cooperative members and independent small stores can take advantage of most of the same economies of mass purchasing and distribution as the chainstores by using central warehouse facilities for their supplies rather than attempting to buy directly from distributors.

In the Los Angeles area, there are only three products delivered in any quantity directly to the stores rather than through the warehouses: milk, bread, and soft drinks. Milk and bread have a very short shelf life and require special handling. Milk must be continually refrig-

erated. Bread must be protected from crushing.

There is no such justification for direct delivery of soft drinks. The stores do not want the soft drink truckdriver backing up behind the store and requiring special handling of his product outside the more efficient distribution and handling system they use for most other products.

In most instances, the retailers have no choice but to take soft drink delivery at each store, because the bottlers refuse to deliver it to the

warehouse and there is only one source of each brand.

Because each bottler has an exclusive territory for his brands, there is no competition to provide the more economical warehouse delivery and distribution the stores prefer. If the store does not like the bottlers'

terms, its only choice is to drop his brand entirely. They cannot go to

a competitor for either a better price or better service.

It should not surprise anyone that where a bottler has a monopoly on a heavily promoted brand in a defined territory, his price is going to be higher than if he had competition. This is exactly what happens, at this point.

Soft drinks are wholesaled at artificially high prices that reflect

the absence of competition among bottlers of the same brand.

When I started my business, a little over 2 years ago, many of the buyers I talked to asked if I could develop a competitive source of brand name soft drinks to be delivered to the warehouses.

I could see that there was plenty of "fat" in the prevailing bottlers' wholesale prices, and that the "fat" would let me ship soft drinks long

distance and still undersell them in Los Angeles.

It was not long before I found a distributor in Las Vegas who could buy Royal Crown, Diet Rite, and Dr. Pepper from a bottler there and ship it to all my customers in Los Angeles.

At that time, R. C. Cola was selling "off the truck" and delivered by the bottler to each individual store in Los Angeles at \$3.20 per case;

the warehouse price on those items was \$2.95.

My distributor was able to buy the same product in Las Vegas, ship

it to Los Angeles and charge \$2.55 delivered to a warehouse.

Now, the warehouses add a charge for their handling which usually runs about 4 percent. So the product was delivered to the stores at a cost to them of \$2.65 per case. The stores like to work with a 20-percent markup on beverages, and they pass 80 percent of the savings on to the customer in the form of a lower retail price.

Warehouse delivery affects consumer prices in another way, too. Under the exclusive territory system, a chain with stores in several different bottlers' territories may be paying different prices for the

same product at various stores.

Bottlers of the same brand rarely, if ever, coordinate their wholesale promotional deals. So the chain has a difficult time creating retail promotions because it can't advertise the same price for all of its stores.

If the product was sold to the warehouses for distribution, the stores serviced by the warehouse would have a standardized price on which they could base their advertising. Consumers would benefit from more frequent promotional low prices on soft drinks.

The Royal Crown bottler in Las Vegas was unable to keep on supplying our distributor. He also owned a soft drink canning plant in

Phoenix which was doing contract packing for Pepsi.

Pepsi told him it would take that business away from him unless he stopped selling to our distributor and unless he sold the Las Vegas

franchise to an approved buyer.

Our next venture in soft drinks came when we contacted Pope Foster, the Coca-Cola bottler in Taft. Canned Coke was selling at \$3 per case to warehouses in Los Angeles. The Los Angeles Coke bottler supplies cans, but not bottles to warehouses.

We set up a distributor with a warehouse in Taft. Foster supplied Coke to our warehouse and we were able to deliver to customers in Los Angeles at \$2.70 per case. Even at this price, there were a good

profit for Foster as well as for us.

Unfortunately, the Coca-Cola Company knocked us out as competitors to Los Angeles Coke by retaining the sirup it supplied to Foster in Taft. During the time we were able to obtain Coke from Foster, our customers in Los Angeles passed on to their retail customers just about 80 percent of the price reduction we were able to give them. That is, their profit margins were maintained as the price was reduced.

We also obtained Coke for a short time from a distributor supplied by the bottler in Bishop, Calif. This supply stopped when his sirup

flow was restrained, too.

Since our soft drink sources near Los Angeles had been shut off by the sirup companies, we began to look further from home. We found that we could obtain brand name soft drinks from St. Louis, Mo., from Illinois, South Dakota, Montana, and Nebraska, and deliver it under the prevailing price in Los Angeles.

Even then, with the cost of transporting a low-value, liquid product two-thirds of the way across the country, we would have made a good profit. However, the sirup companies pressured our sources and pre-

vented them from dealing with us.

Finally, we found a distributor in Denver, Colo., who could supply R. C. Cola. The price of the product from the Los Angeles R. C. bottler is \$2.95 per case, on cans. We bring it 1,000 miles from Denver and sell it in Los Angeles for \$2.75 per case.

Of the 20-cent saving, the store keeps 4 cents. Sixteen cents is passed on to the consumer. Now the R.C. bottler in Denver is being harassed and pressured to stop selling to our distributor. So far, he has resisted

and they have not yet shut off his sirup supply.

If we are able to introduce competition into the soft drink business, we will bring better service to the retailers and lower prices to con-

sumers. We will prosper as a small business ourselves.

Finally, we will help many soft drink bottlers who are now frozen out of the markets where the action is. These little bottlers are confined to their exclusive territories where they will eventually find their volume is too small to permit them to survive.

They cannot afford to remain in a business that requires expensive equipment or efficient and high-quality production, unless they can

develop the volume to pay for it.

With the aid of brokers or distributors like me, they can capture a part of the large urban markets and find the volume they need to stay in the business. Without it, they will disappear and leave the field to the already large bottlers, who will take over without any competition from other bottlers of the same brand.

There is another aspect of this bill that works against the small bottler. Most of the large grocery warehouses are located in the exclusive territories of large bottlers. These warehouses serve stores

in the exclusive territories of other small bottlers.

Whenever soft drinks do find their way into the warehouses they are going to be distributed to the small bottlers' customers. And it is the big bottler who will be supplying the warehouse because it is in his territory.

It is easy to keep the little bottler from selling to a warehouse. A limit on his sirup supply is an effective way. But it is almost impossible to an force part it is a reflective way.

possible to enforce a restriction on the large bottlers.

This bill would discriminate against the little man simply because it is easier to enforce restrictions against him. He will lose customers to the big man who sells to the warehouses and will be unable to fight back because his sirup supply is a short and tight string by which he can be controlled.

I think we have shown what a little free enterprise and competition can do for the soft drink business. Any legislation that permits exclusive territories to continue will guarantee that the present conditions of poor service and inflated prices will continue.

This bill will not help the little man. It will guarantee his exclusion

from the soft drink marketplace.

Mr. Chairman, I have something else if I could add. After hearing 2

days of session, I would like to add a few comments.

In previous testimony by the large bottlers and sirup suppliers and with all of the brains and marketing expertise, it defies the imagination that their big concern seems to be how to distribute their product to the small high-cost, low-volume accounts across the country.

The only thing they have come up with, with their great expertise and expensive management consultants, is that this distribution is impossible without territorial restrictions. Why is it, then, possible for Los Angeles Coke to distribute Jamaica Cola, a Canada Dry product,

on the same trucks that carry Coke?

I understand from other bottlers that this is in violation of their master contract with mother Coke. This being the case, why cannot smaller unprofitable accounts in the outlying areas be serviced with a multibrand distributor who will handle more than one major brand on the same truck and will cut everyone's expenses?

This can be done by buying major brand products at quantity price and still deliver it at a fair cost to the dealer and also a fair price to the customer or consumer. Not only can it be done, it is being done.

This is being done in some resort areas of California and desert areas, also in parts of Montana, where a distributor is servicing an area that is too distant from the production plant. The merchandise is delivered to the distributor by tractorload, and the distributor breaks it down into smaller loads of mixed brands to accommodate his customers.

I do not have a large staff to explore a number of these situations, but in the few contacts that I have made, these outlying areas do not

seem to be large problems to these bottlers.

It was not important to me because I did not know it could not be done—to get this merchandise to the outlying areas. But the only reason I knew this now was that I heard all of the experts tell me this. The bottlers and distributors apparently did not know this either.

They solved their own problems.

These parent company people act as if they own these markets. Transporting beverages is no different than handling canned peaches, detergents, and other grocery commodities. If the soft drink industry needs territorial restrictions to protect returnables, would it not be logical to protect just those returnables with a restricted area and let the no-returns trade in a competitive open market?

Would this not be somewhat similar to the postmix marketing

strategy which has no territorial restrictions.

I am appalled by all of the large company paper that has been turned out at great expense to show something cannot be done, when small businessmen with their own gift of American ingenuity can solve their own problems and, incidentally, solve the problems that corporate giants are unable to manage.

If you have any questions, I will try to answer them.

Senator Harr. I think the staff does. I am reminded of a comment I made to Senator Hansen. Life would be simpler around here if there were not conflicting opinion voiced by each witness. Each seems persuasive and logical. All it does is serve further to make one uncertain as to what is, on balance, the best long-term interest of everybody, and understand me, everybody that is involved in that long-term trip buys a ticket that best accommodates his own individual interest. I have no quarrel with that at all.

Mr. Bangert?

Mr. Bangert. Mr. Heckenkamp, so that we can have a complete record, you indicate you are a small businessman, you are a food broker and distributor in the Los Angeles area?

Mr. Heckenkamp. Yes, sir.

Mr. BANGERT. I take it that you broker other than soft drink

products; is that correct?

Mr. Heckenkamp. Yes; we do. We represent a number of accounts. We represent Lormac Plastics, which is a bottled water concern, shipping plastic bottles, gallon bottles of water into supermarket distribution.

We represent the Dow Chemical Co. on car care products, which is Dow Super Coolant, and other allied products for grocery distribution. We represent the Imperial Detergent Co.; General Beverage Co., which is Royal Crown and Diet-Rite; Mouren-Laurens Oil Co., who handles major brands of motor oils, all major brands of motor oils; plus products which is a health food, Tiger's Milk Products.

We represent a sausage company with European-type sausage in a fresh state, and delivered to sections. We represent Sea Snack, which is a seafood, cocktail, and fresh shrimp outfit that delivers these to

the grocery chains and co-ops.

We represent Ponderosa Paper Co., which is a recycled paper towel and napkin; canned seafood and catfood, under Universal packers; Chem-Lab, which is a pool chemical outfit with liquid chemicals, acid and chlorine and dry chemicals; and a few other companies, but those are the main ones.

Mr. Bangert. So you really have quite a wide range of products

under your——

Mr. Heckenkamp. Pretty broad, under most of the sections of the grocery chains.

Mr. BANGERT. Now, most of these products are sold under an exclu-

sive territorial arrangement or not?

Mr. Heckenkamp. No, no. There are some items in the oil business. When we are talking of major brand motor oils, we are talking about the quarts of oil that are sold at the filling stations.

This distributor also then sells through us to the chainstores for

distribution.

Mr. Bangert. Well, what is your experience with respect to the oil part of the business?

Mr. Heckenkamp. Well, I understand that the distributors of major brand oils have had problems in the past of a distributor being appointed to handle a brand, and then other distributors taking more than one brand and distributing them to various areas of the marketplace.

This particular distributor that we represent distributes Pennzoil, Quaker State, Havoline, which are all independent company-owned production plants that provide him with products; he pools it and takes it into major chains, where it is distributed on their shelves by

the chain's people.

And there has been some controversy, I understand, in the past years, that the owners of these oil companies do not like this type of situation, but they have found it to be a fact of life; and in the modern technology of getting products to the marketplace, they have accepted the fact of mixing brands.

So, as of this time, most of the problems that they have had in the past have somewhat subsided because they thought there was no way

that they could control their brand.

Senator HART. I am not sure I follow that. Are you describing situations where sometimes it is desired by a producer that only his brand

of oil be handled, or are you talking-

Mr. HECKENKAMP. Well, most of the oil people—let us take one, Havoline, a Texaco brand, Havoline would rather a single distributor handle their product and distribute it exclusively in an area; but in cases where this has not become economically feasible, the distributor was allowed to handle another brand, such as Quaker State or Pennzoil.

In the growth of this, the distributors are now handling all major brands, and they pool the shipments and break them down into small

increments of a brand and ship them into a major warehouse.

Let us say, 600 cases would go on a truck, 200 of it could be Pennzoil. 50 cases could be Havoline, 20 cases could be Quaker State, and this is the way it goes into the warehouse. Does that sufficiently answer?

Senator Hart. I am not even sure I understand fully what happens in soft drinks, but there is no sirup bottling operation in the produc-

tion of that oil, is there?

Mr. HECKENKAMP. No, they manufacture their own.

Mr. Bangert. For the last couple of days, we have had testimony with respect to the fact that interbrand competition is such in this particular industry as to do away with the need for intrabrand competition, yet your statement and your experience would seem to indicate that if intrabrand competition is not artificially restrained, it does have the effect of giving the customer a better price.

Mr. HECKENKAMP. Well, I think we could probably illustrate that. I think it is illustrated by the chains and co-ops who pass along the savings of the various products that we have been able to bring in

at a lower price; Royal Crown, Coke.

The co-ops also reflect this pricing reduction to their smaller "mom and pops," and smaller chains that they service in competition with

the large chains.

I think, getting to some of the testimony in the past few days, saying that interbrand competition would not be healthy, there is a typical illustration in California of a major brand, Canada Dry, being sold from one territory into another, and no one has gone out of business. Here's how this has come about. Los Angeles Coke, who also owns Canada Dry, has shipped Canada Dry products into major warehouses for years. A man in San Bernardino has many of his accounts who belong to either Certified, which is a co-op, or A. M. Lewis, which is a wholesaler, or major chains, such as Safeway, Alpha Beta; and all of these shipments have been coming into his area for a number of years.

So he took it upon himself to go into Los Angeles and make some contacts with those chains and has been successfully, to my knowledge, the last few years, shipping to major chains, Canada Dry products at a better price than the local man, which is Los Angeles Coke, and it has not affected his livelihood; he is still in business. He also still services the small accounts in desert areas, such as Palm Springs, Barstow, and areas like that which are a lot of miles in between stops.

And this has been accomplished by, I think, the small businessman using, as I mentioned, the American ingenuity to solve his own problems. Both of them, as I understand, have a restricted area, yet this is being accomplished, so I feel that is a clear illustration of how it can

be done, and it is being done.

Mr. BANGERT. I wonder if I could, just for a minute, run through this

Las Vegas Royal Crown deal to see if I understand it?

Now, the Los Angeles local bottler was delivering a case of cans to the Los Angeles chain warehouse for—what was the price of cans to the chain warehouse?

Mr. Heckenkamp. On Royal Crown, it was \$2.95 from the local

Los Angeles Royal Crown bottler.

Mr. BANGERT. \$2.95. And you were able to have it transported from Las Vegas to Los Angeles and delivered to the warehouse for \$2.55; is that right?

Mr. HECKENKAMP. That is right.

Mr. Bangert. So that would be in the neighborhood of 15 and 16 percent lower price that you were able to deliver for; is that correct?

Mr. Heckenkamp. I would say, it would be close, yes. I am not sure of the percentage, but I would say 15 to 16 percent would be about right.

Mr. BANGERT. And how far is it from Las Vegas to Los Angeles?

Mr. Heckenkamp. 300 miles.

Mr. BANGERT. And do you have any idea what the shipping charges

would be from Las Vegas to Los Angeles on the case?

Mr. Heckenkamp. Well, we were not the distributor in that transaction; we were the broker. I would think it probably ran somewhere in the neighborhood of 15 cents a case. I would say, that would probably be close. The distributor never told us what his freight problem was. The distributor paid those costs.

Mr. Bangert. All right. And you had, as I understand, you had three businessmen, really, in on this deal that had to make a profit. You had the bottler; you had yourself as the broker; you had the

distributor?

Mr. Heckenkamp. Yes, sir.

Mr. Bangert. And yet you could still deliver it there for 15 percent less?

Mr. Heckenkamp. Well, that is where we first got the idea that maybe there was some "fat" involved. The bottler there—to go into the whole story—the bottler there was being shipped in on by Royal

Crown Los Angeles through, there again, the co-ops, Certified, Ann Lewis, wholesaler; and the chains who are in the Las Vegas area.

He had massive shipments coming into his area; and when he questioned the parent company, the parent company said there was nothing they could do about it. So when this distributor wanted to buy merchandise from him, he was glad to sell it; he had a new customer.

It found its way into Los Angeles through our brokerage, and at that point in time, he really got some pressure because this—in other words, the local man, as I understand it, was invited to Las Vegas on the possibility of him buying the Royal Crown plant in Las Vegas.

And there again, I understand the man came in and said. "Why buy it?" Which, in essence, means he was getting the business any-

way; why buy that territory? He had no need for it.

Mr. Bangert. You mean someone else was shipping into the Las

Vegas territory?

Mr. Heckenkamp. Right, the Royal Crown bottler in Los Angeles was shipping to the major warehouses and to the co-ops, which, in

turn, was transshipped into the Las Vegas.

Mr. BANGERT. Another thing that has been discussed during the hearings are that there is no assurance that even if territorial allocations were done away with and there was intrabrand competition that the consumers would receive any savings in that the supermarket would not necessarily pass that along to them.

And, as I understand from your statement, your feeling is that

they do, the consumer does receive a benefit.

Mr. HECKENKAMP. Well, in most of the instances that we have brought products in from other areas, the chains are so highly competitive that they want to lower that price; they do not want to keep that price up to make extra profit. Contrary, I think, from all of the testimony that has been heard, we have the situation right now with Royal Crown cans, their normal price in the market for people who would not buy on our program is around 89 cents.

The chains who do buy and the jobbers who reflect the allowances are selling retail, at 85 cents. That is 4 cents a six-pack cheaper, which is a reflection of the moneys that they have saved in going with our

distributor's program rather than the local bottler.

Mr. Bangert. As I recall from Mr. Ward's statement vesterday, I think he indicated that consumers spend about 5 percent of their food budget on soft drink products, so we are really talking about a pretty

good amount of money, are we not?

Mr. HECKENKAMP. You are talking about, yes, I think, a substantial amount of money as far as the housewife is concerned. I am somewhat amazed myself in seeing the consumption going through the stores and watching these families load up six-packs of merchandise. I wonder how they possibly can consume it all. But it is being consumed, and those savings that can be passed on to them, I think, will help the housewife with her budget.

Mr. Bangert. One of the points that was made is that there will not be that many consumers that are going to benefit anyhow, but I would assume that any consumer that does buy its product in either the chainstore or in an independent store that has cooperative warehouses, would

benefit by the abolishing of the territorial restrictions.

Mr. Heckenkamp. Yes, I think—are you in reference now to the smaller stores, possibly that would be serviced by co-ops with these savings, because co-ops do pass these savings on?

Mr. BANGERT. Yes, yes; that is right.

Mr. Heckenkamp. So that the "mom and pops," then—in other words, I think that most of the testimony that I have heard, the large sirup concerns and the large bottlers are very much in fear of the chains trying to take over their business which, I think, is somewhat ridiculous.

There are only a few major chains, one being Safeway, who has their own bottling operation, and they are not, to my knowledge, in any position where they feel they want to get into a Coca-Cola franchise or an R.C. franchise. They have their own product that they distribute and produce, so I think this is a little—this line of thinking that they want to take over the business, I think, is a little ridiculous.

Does that answer what you—your question?

Mr. Bangert. Yes. Yes.

I wonder if you could explain a little better. I am confused by it. You say that:

The Royal Crown Bottlers stopped supplying your distributor.

And you say—

He also owned a soft drink canning plant in Phoenix, which was doing contract packing business, or packing for Pepsi, Pepsi told him they would take that business away from him unless he stopped selling to our distributor and unless he sold the Las Vegas franchise to an approved buyer.

I do not understand why Pepsi would be interested in this to begin with. You were not transshipping his products, were you?

Mr. Heckenkamp. No, sir.

How this came about, the man in Phoenix who had the contract packing plant, packed for all of the major producers with the exception of Coca-Cola who had their own canning line. This is the common occurrence; the references that have been made were a lot of small bottlers cannot afford to put in a canning line. They will get their product contract-packed at a regular canning concern. This man's business was based on—or I would say, 90 percent of his business was done with the majors, such as Pepsi, Seven-Up, Dr. Pepper. He canned for all of them.

They would supply him with the syrup and the blank cans and he would fill it to their specifications. And how this pressure came about, as it was related to us, was that in canning all of these various major bottlers' brands. Pepsi being the largest in his fold of contract canning contracts, it was my understanding that Dr. Pepper, which was one of the brands that we brokered in the Los Angeles area, was very

upset.

They claimed that that point there had never been violated, whatever "violated" means to them. We were made to sign an agreement that we would no longer solicit orders for Dr. Pepper because of the pressure Dr. Pepper was putting on them, and through Dr. Pepper, Pepsi was induced to come up with these statements that they would pull their contract canning business away.

Since then, Pepsi has not only pulled theirs away, so have most of the other majors. So even though he was trying to comply with their wishes, they still pulled the business away. Pepsi now has their own canning facility, and a number of the other large ones, I understand, do not let him contract their merchandise, R.C. being one of them.

So anyway, the pressure was on him to sell these two franchises because the parent companies knew that the merchandise was going to a distributor in his area and legally they felt at that point, I feel, that that was a man in his territory. That distributor was a legitimate distributor. So that there was no way to stop him other than either shut off the juice or make him—push him to sell the franchises.

Mr. Bangert. Well, are you saying they did not want the precedent

started of transhipping, is that it?

Mr. Heckenkamp. Exactly, exactly.
Mr. Bangert. And you said you signed an agreement not to?

Mr. Heckenkamp. Well, we were made to sign an agreement that we would no longer solicit orders for Dr. Pepper because Dr. Pepper was the company that was so upset. In fact, in one chain, we got distribution on Dr. Pepper items that exist today that they did not have before we put them in that chain.

Mr. Bangert. Well, who asked you to sign that agreement?

Mr. Heckenkamp. The canner who owned the franchises. He wanted to take that back to Dr. Pepper to prove that there would be no longer any orders solicited by a broker in Los Angeles.

Mr. Bangert. Was the Las Vegas' franchise eventually ever sold to

an approved buyer, do you know?

Mr. Heckenkamp. Yes. Dr. Pepper was sold to Coke Los Angeles or Coke Vegas, however you want to put it. They now have the franchise for Dr. Pepper and Royal Crown and Diet Rite was sold to Seven-Up and Canada Dry in Las Vegas. Those were the approved buyers, apparently, that were referred to.

Mr. Bangert. How long did you have your arrangement with the

Las Vegas distributor?

Mr. Heckenkamp. Oh, a period of about 8 weeks, 10 weeks.

Mr. Bangert. Do you have any idea about how much product you

brokered into Los Angeles during that time?

Mr. Heckenkamp. Well, it was somewhere in the neighborhood, counting all brands and packs, 130,000 to 150,000 cases. We were just in the process of spreading the distribution of those products to all the majors in the Los Angeles area when the franchises were sold, or forced to sell.

Mr. Bangert. Now, as I understand it, you are currently handling Royal Crown through a Denver distributor or a Denver bottler; is that

right?

Mr. Heckenkamp. Yes, sir. Yes, sir.

Mr. Bangert. And again, you are delivering Royal Crown into Los Angeles from Denver for \$2.75 a case, is that—

Mr. Heckenkamp. Yes, sir; \$2.75 a case is right.

Mr. Bangert. And that is a thousand miles from Denver into-

Mr. Heckenkamp. Yes, it is.

Mr. Bangert (continuing). Los Angeles.

What does the transportation cost from Denver into Los Angeles? Mr. Heckenkamp. Well, there again, we are not responsible for the freight, the distributor is. The fact of it being the difference in miles from Los Angeles in relation to Las Vegas, I would say, probably

somewhere in the area of 35 cents compared to probably 15 cents out of Vegas. I would say, that would be the range.

Mr. Bangert. And again, you are selling at 20 cents below what was

the established Los Angeles price?

Mr. Heckenkamp. Yes, sir.

This, by the way, has brought on some interesting facts from the local Los Angeles Royal Crown Bottler who, as it has been previously

stated, is owned by Beatrice Foods now.

When we came in with this program, they immediately started a new promotional program, it was called, and at that time, they promoted cans of Diet Rite and Royal Crown at the same time, which to our knowledge, had not been done before. And they promoted it with

40 cents a case for a 30-day period in each quarter.

They announced their plans ahead of time, which there again, was never done, because normally a company does not like to let its competition know when they are going to promote because, then, Coke and Pepsi could come in with wide promotions and knock their promotion out. Yet, they did this after we got into the shipment of this merchandise.

Mr. Bangert. So again, it would appear that there was some intra-

brand competition that caused this-

Mr. Heckenkamp. Well, I would say, yes, because the intrabrand competition was responsible for this promotional activity. If the records were looked up, they would find how few promotions had been run on R.C. and Diet Rite cans.

Their philosophy is to go back to the returnables. They have billboards all over town saying "Go back to returnables," so they do not

really want to promote cans.

Mr. BANGERT. When did you begin this Denver arrangement? Mr. Heckenkamp. It was somewhere in November of 1971.

Mr. BANGERT. And is it still in existence?

Mr. HECKENKAMP. Yes, it is. We are shipping currently in fact, this week the last promotion that the local Royal Crown and Diet Rite man had put us out of some of the chains because they are going to take full advantage of all of the economies they can.

They had 40 cents a case and we dropped another dime to try and get as close as we could to them, but from distance we could not do as good a job, so some of the chains bought at the 40-cent reduced price

and, of course, passed it on to the customers.

So it seems a little ridiculous why these chains would not want to promote these national brands. They promote every other national brand in every other section of the store, including soaps, detergents,

everything.

Mr. BANGERT. The thing that sort of is impressive about this is that you can ship all of the way from Denver at 20 cents savings, and I would assume that had you been able to have gotten that in Los Angeles, there would have been even more of a savings, or you could have sold it at even more of a lower price.

Mr. Heckenkamp. Well, yes. That brings something to mind.

When the Las Vegas distributor was put out of business on canned drinks, we went to the local R.C. man and asked them if they could use any help promoting their product, and the man we talked to used

to be with the broker in Los Angeles who handled Royal Crown cans

when it first went into the warehouse.

In other words, Royal Crown got this man from a broker, and when I suggested we could handle their products and do a better job with them, he thought it was quite humorous. And he said, "we had a lot of guts walking in there and making that offer," but that is part of our game, having the guts, I guess, to do the things that have not been done.

Mr. BANGERT. And then again in your statement, you lay out a deal that you went into with the Taft bottler, Mr. Foster on Coca-Cola, and there again, the current price was \$3 a case and you were able to

deliver it to the warehouse there for \$2.70 per case.

Mr. Heckenkamp. Yes, sir. We were able to do that. This is being done on what we call a "back-haul program," and I am not so sure everyone understands what a "back-haul program" is, but the chains deliver merchandise to the outlying stores and come back empty, so it is very convenient for them to come by a warehouse and pick up merchandise and take it back into their warehouse.

Mr. Chumbris. Mr. Bangert, will you let me interject for one mo-

ment?

Mr. Heckenkamp, you studied this for a long time and you have your facts before you and you are throwing it at us in a matter of a day or two.

Mr. BANGERT. We have had a lot of facts thrown at us.

Mr. Chumbris. But what you are saying here about you going to Denver and being able to bring it back into Los Angeles and sell it for a certain price is exactly the problem that Senator Hansen was concerned about in his testimony.

If we don't have this territorial exclusivity law, that is just what is going to happen to the little fellows in the outerlying areas of all States, not just one State. I can see, without this law, the small bottlers

will be invaded by larger franchises.

They are going to ship it in from Denver, and from Las Vegas, and from possibly St. Louis, and maybe from Dallas, Tex., and all the little fellows in between are going to be just dried right up, if this law is not passed.

Mr. Heckenkamp, No. sir.

Mr. Chumbris, Now, I know you have got your thoughts. But the trouble is this: I have a lot of ways, and other staff people have a lot of ways to tell the Senate how to run its business, and they will let us tell it, but they will go on and do their business as they think best as develop over the years.

And the same thing with Coca-Cola. The Coca-Cola people did not have to sell that syrup to bottlers all over the United States. They just could have handled it themselves and established their own 100 percent-owned bottling plants every place in the United States, and every sub-bottle if they wanted to do it that way. And Pepsi and

Seven-up and others could have done it also.

But that is not the system that they developed. You used canned peaches and soap as examples. Well, that is a little bit different illustration. And we have had the problem of canners in S. 11 hearing way back in 1957, and the problem that faces the canners, the big ones and the little ones, and the problem that faced the distributors, and the problem that faced the consumers down at the end of the line.

If we are going to worry about consumers only, I mean, as far as cheap pricing, well, then, you would get a heck of a lot cheaper pricing in Coca-Cola if you brought in labor from Mexico, protecting union labor.

And just to do away with our laws, we could bring all the workers from Mexico at maybe 10 or 20 percent of what the cost of labor is in the Los Angeles area, but what would that do to our economy—the only design we have is to see that we got the lowest possible price for

the consumer through cheap labor.

And as Mr. Smith said the other day, for a 16-ounce returnable bottle the consumer is paying exactly the same price per ounce as he paid in 1900. Now, you can throw all of these figures at us and you can throw them out well, but the point is this: We just cannot look at just that one little thing about what the consumer is going to pay because the consumer is a taxpayer, and at the same time he is a part of this great economy. He probably has a factory of his own or he is probably a salesman or a doctor or a lawyer, and he has got to see that that money flows in the appropriate cycle to improve the economy of that area.

You just cannot look at that one little price issue, otherwise, we would not have enacted laws to protect prices on fair trade on certain items, we would not have allowed patents to be issued, so the man who

has a patent can set his price for a certain period of time.

We have a lot of laws that look beyond the question of the cost to

the consumer.

Mr. Heckenkamp. Well, you make a point that Coca-Cola, if they wanted to, they would have made a national organization and not had little bottlers. I think if you look back into history—and they keep citing 70 years, which I think is beautiful that a company can show a pattern going back 70 years—but in my own estimation. I think that if they had wanted to form that type of situation, they would have never started franchising.

To my way of thinking, the only reason a company franchises is because they do not have the adequate capital to form a national

company.

But in doing that, I realize that is fine. They started a lot of small businessmen. But the small businessmen are falling by the wayside that they have no regard for is continuing, and putting the restrictions that you people are talking about is not going to hinder the reduction of these bottlers.

These already come with the efficiencies that have to be made to make things profitable. Now, the fact that they are distributing a product at the same price that they did in 1900 has to be done by the economies of machinery, less cost in glass; all of these things had to be passed on.

Either that or the market was so tremendous in those days it was not hard to find a franchisee because he could bottle it for little or

nothing and sell it for a good price.

Mr. Chumbris. You point out that they started that system because they had to. That might be true. But there is nothing in the world to

stop them from taking it back.

We have had here matters on the franchising bill since 1965, and when that bill was before the Senate, some of the franchisors got worried because the terms of that bill would have placed certain obligations on the franchisor, so they got worried.

One particular franchisor that gave all of his franchises to small businessmen, has bought some back. Now, he owns one-third of the franchises that once he gave into the hands of the small franchisee.

Why? Because he was worried about something that might develop,

so he was protecting himself.

Now, the same situation could apply here. If Cola-Cola or Pepsi or Seven-Up sees something in the wind that might create a problem for them, they could go ahead and buy back some of these franchises. I would assume, from what I have heard in the testimony here today, that they could do so, and that is one of the worries of this hearing.

But the main thing that we are concerned is that wide open space that I was referring to yesterday and the day before. Those are the fellows that have come to these 40 Senators and said, "We need help," just like we have helped people in other areas. We have special bills to help individuals where there is \$100,000 damage and they cannot collect a dollar of that loss, or they want a special bill, Congress looks into those matters.

And all Senators and Congressmen must pass that bill, although the matter may come from some insignificant person, from a little town in the smallest State in the Union. Still, the Congress sees that there is a problem and they want to face that problem.

Mr. Heckenkamp. Can I answer a couple of things? And I am sure you are convinced that your point of view is the right one, as we all

tend to be.

The one thing that really bothers me, you say that the Coca-Cola Bot-

tling Co., or Pepsi, or whoever, could buy back these franchises.

That may be the simplest answer. Why has not this offer been made to anybody? Mainly because the only thing they serve to these bottlers is sirup. Their main concern is sirup. As they state, they do not share in the revenues that the bottler gets out of his product, so the sirup is all they are really worried about.

Now, if they are that worried about the bottler, would it not seem to follow that they would then do like you say, like Kentucky Fried Chicken and some of these people have done, bought back franchises.

because they saw the profitability of it?

They have not made a step to do that. It is much easier, in my own mind, if I were a businessman, I think I would probably think the same way. Let them do their own thing out there and if they fail and do not make it, then that is that many less people that they have to deal with.

Now, let me say this: We are not shipping into all of those "white" areas that you are talking about. We are not hurting those small bottlers by bringing it from one major area to another. We are not affect-

ing those little people out there.

In fact, we would make an offer that we would buy products from them. We have made offers, but we have not been able to obtain product. We gave one man a check in advance for product. He said, "I will ship to a distributor in my area." That man did not ship because he called his regional office in Denver and requested more sirup, and the man said, "Where is the merchandise going?" He said, "It is going in my area to as distributor."

He said, "Ah ha, I can see that with this increase in syrup, you are shipping out of your area. This order will be denied." The man never

shipped and we had to go back and get the money back.

Now, this is a little man, and he was out in an outlying area. We had to fly into the area, if that will give you some kind of idea as to where

it was, in a small plane, not in a large plane.

Now, it defies my imagination that all of these little bottlers are sitting out there saying, "I need all of this protection." The mother companies are saying, "You go in there and you tell them you need it," because that is why they call them "parent" companies.

When you were a kid, did not your parents say, "Do not smoke, do not do this," and you did it? That is exactly what the—the framenol-

ogy is apparent here, and we have heard this from bottlers.

Mr. Chumbris. I do not want to debate the issue. I am just trying to point out why the Congressmen and the Senators have introduced these bills and why the people—not Coca-Cola—but the bottlers around the country, bottlers from the State of Nebraska who have

written in to their congressional delegation.

The bottlers from the State of Missouri, the bottlers from the State of Nevada, Montana, New York, wherever the case, all I imagine, from all 50 States, whether they have joined the bill or not, the Congressmen and the Senators have received letters from the bottlers themselves; some of them big bottlers of Omaha and others may be small bottlers from Cooke, Nebr.

There must be a reason for them to be worried.

Mr. Heckenkamp. I think, yes, there is.

Mr. Chumbris. And if we want to do as you point out and have nothing but large chains and have people going from way down South-cast Washington all the way out to Rockville, Md., to buy something, and they bypass that small store which is only 15 feet away from their apartment or their home then "mart" system will knock out the "Mom and Pop" stores out of business.

And if you want to do that to small bottlers of America, well, you

go ahead and take the position that you have taken here today.

Mr. HECKENKAMP. I do not want to hurt those people.

Mr. Chumbris. It helps your business to have it that way.

Mr. Heckenkamp. I would like to make offers to all of the small bottlers to help them in any way I can through the system of marketing their products.

Mr. Bangert. Well, as Mr. Chumbris says, eventually Congress is going to have to vote on it, so I guess we have to get along with the

development of the record so that a decision can be made.

Mr. Chumbris. Well, I am here to give the side of the story, that 36 Senators on that bill expect and it looks like I am the only one pushing their position.

Senator HART. I am just trying to think over what I have heard for

a couple of days. I think it has been pretty balanced.

Mr. Chumbris. I am talking up here, Senator.

Senator Hart. The record is made down there. The record is made down there.

Mr. Bangert. We were talking about the deal you entered into with Taft to ship product into Los Angeles and I wonder how much—how long did this arrangement last, the arrangement between Taft and you.

Mr. Heckenkamp. Well, as Mr. Foster stated, he put in an order for 50,000 cases of cans, one truckload was shipped, 2,000 cases. We

shipped that load into our Los Angeles market and he was then informed that he was on a syrup ration and would not receive the balance

of the 50,000 cases.

So, 2,000 cases of the opening order was what was shipped before the parent company or mother company, however you want to refer to it—we refer to them as "syrup houses"—decided that he should not have any more product.

Mr. Bangert. Well, if you shipped 2,000 cases in there, even though you did come in below the current market price, that small amount could not have had that much of a competitive impact on the market;

Mr. Heckenkamp. No; that particular load, I am sure, did not. The only problem was we were issued purchase orders for a year's business which amounted to, with just two concerns in Los Angeles, amounted

to about 2.2 million cases.

Now, that 2,000 cases, you are right, is a very small percentage and I am sure some of the people in Los Angeles chuckle to themselves as to what a dribble that was, but the balance of those 2 million cases could have and should have been delivered within that year's period.

Mr. Bangert. So you could have shipped—you had firm contracts

for 2.2 million cases?

Mr. Heckenkamp. We had firm contracts for a year's supply from two firms and a third firm who said they would give us weekly orders for a total of a year. And the first two we had contracts, we had purchase orders that if anybody wants to see them, we can show them-I will get them for you—and they were signed by their executives.

One was a co-op, which serves many, many small "Mom and Pops," a lot of small liquor stores and these people would have benefited by

buying this merchandise at this price.

Mr. BANGERT. Do you know what the total Coke market in Los Angeles is?

Mr. Heckenkamp. I would say, somewhere in the area of 9 to 10

Mr. Bangert. So you would have had large portion of that market

Mr. Heckenkamp. Well, if the figure is 10 million, we would have had approximately 20 percent, but I am not sure that we could have sold all of it in the market as has been stated, that should this thing happen, we would capture the total market. I do not think that the man in Los Angeles is going to insist that that is where the intrabrand competition seems to be very apparent.

He made mention of that yesterday, I think, and that should that happen, he would have to take adequate steps, which would be similar

to what Royal Crown has done in Los Angeles.

I think that when this type of thing happens, as we stated earlier. the consumer is the ultimate gainer, but the fact of making these statements-I would not want to make some of the statements that were made about my largest customers being the chain people, that some of these people made.

If I were a chain man, and a chain owner. I think I would somewhat resent some of the things that have been said, and the fact that they are a big outlet for the soft drinks, I would take a very dim view, if

it were me.

This is my own opinion. I am just giving a little comment.

Mr. Bangert. You alluded in, I guess, the addendum to your statement, to this, but the point has been made that the small retailer would no longer be served if the exclusive territorial system was scrubbed.

And yesterday, for instance, Mr. Kintner talked about the bowling alleys and the gasoline stations, and the various other small retailers that would not be served and I am wondering whether or not you have enough familiarity with the distribution system that you have a feeling on this.

Mr. Heckenkamp. Well, I have heard a number of references to those small bowling alleys and restaurants, and it is funny that all of these people are getting merchandise now of other varieties, other

The restaurants are supplied by institutional restaurant supplies. The bowling alleys are supplied by beer distributors and many, many other distributors. The filling stations are being supplied by a number

of people.

As I mentioned, there is nothing that says that a distributor could not handle multibrand. Their fear seems to be that if Coke and Pepsi and Seven-Up and Royal Crown were all put on the same truck that this man is going to have his own preference of what to put in those

places.

And the large concern for those small distributors, I can understand, but by the same token most of the large companies—now, I did not mention, I was formerly with a large manufacturer of soaps and detergents, and their policy was that the smaller areas that could not be economically served with their own trucks on either a drop shipment program or if they were not members of the wholesaler, they would then get a distributor to handle not only their product, but they were also handling other soap companies' products.

And I think this method can be used, as I say, effectively, in those smaller no-profit areas, anyway. Why should a consumer suffer—as a man previously, here this morning, stated—there has to be some way

to offset these costs.

In other words, in order to service the small area, you have to raise your price to everybody. Now, to me, this is somewhat of a discriminatory practice, to say to the little guy out there, "I'll deliver to you for the price I deliver to you, but I am going to jack up all of the bigger

customers I have here because it costs me more to service you.

Now, if that is sound business, I have missed the whole point in the business world. That does not seem to me to be sound business practice. And I appreciate Coke, Pepsi. Seven-Up, wanting to be everywhere and anywhere at all times, but in this day and age, it is not something that even the major companies, which are far larger than these bottling companies or sirup companies, cannot maintain.

It is just economically not feasible.

Mr. Bangert. Just one other area, I would like to cover with you,

Mr. Heckenkamp, and that is the area of returnable bottles.

And in some of the testimony given, it was indicated that the major chains discourage returnable bottles and that the returnable bottles give a less cost per ounce to the consumer than the no-return bottles. And I wonder if you have any comment on either of these items.

Mr. Heckenkamp. Well, after hearing the testimony in the past 2 days about the great revival of the returnable bottle and the return to this antiquated method of getting product to the consumer, I had my small staff do a little research for me yesterday in the Los Angeles market.

And I find that the 16-ounce 6-pack of Coca-Cola in a no-return carton that is currently being shipped to a warehouse is retailing at 6 for

89 cents. Now, that gives you .927 per ounce.

By the same token, a 12-ounce returnable bottle retails for 6 for 78. not counting the deposit, 6 for 78, which gives you a 1.083 cost per ounce.

Now, unless my arithmetic is bad, it seems to me that the no-return bottle in the no-return package is selling at a cost per ounce less than

the returnable bottles.

Now, this returnable thing really concerns me because the returnable situation, No. 1, there seems to be a big mystery about—the parent companies and the bottlers do not understand why the retailer does not want to handle a returnable bottle.

And one thing has never been brought up in all of these proceedings is, what does it cost a retailer to handle a returnable bottle? They

keep stating, well, they do not want them in the warehouse.

Well. I think everyone can understand that that is extra handling. That handling costs the chain money, not the franchisee and not the parent company.

Now, as Mr. MacDonald said yesterday, they used to get 20 turns or 24 turns on a bottle. Well, that is fine, and it is great that it was

that, but it is not that today, which he also stated.

But getting to the handling of these items and what it costs, the chains have done a study in Los Angeles—and I am talking about all of the chains—they have calculated that the handling cost on these returnable bottles is anywhere from one and a quarter to one and a half cents per bottle.

Now, major manufacturers issue coupons for merchandise, 10-cent off coupons; you have all got them in the mail; IBM coupons, whatever they are. Down at the bottom, you will read that there is three cents handling. That is, a three-cent return to the chain for handling that coupon. Yet, the bottlers give the chain nothing to handle those

returnable bottles, nothing.

And if you will notice in the front of the store, they have certain people that do nothing but take the Pepsi bottles and put them in the Pensi cartons and the Coke bottles in the Coke cartons and the Seven-Ups in the Seven-up cartons. That is where part of the cost is. Any breakage is on the chain. They have already given the deposit back to the housewife.

Now, the thing that really concerns me is that in the talk of the returnable bottles not coming back like they used to. There was some touchings on the ecological situation. I do not like the way the parent

companies and bottlers jumped on that situation.

The only problem that really concerns me is that if they are not getting the returns on the returnable bottle-in other words, now, if it was 24, if that was the figure, and it is now down to 10-in our area, I understand, it is down to 5 turns on a bottle-when these people are throwing away a returnable bottle that has probably twice as much glass involved, it seems to me they would be actually adding to the ecological problem by throwing a returnable bottle away rather

than a no-returnable bottle.

And Mr. MacDonald, I think, put it very finely when he mentioned that the affluent society today really is not concerned about that deposit, even though they have upped the deposit in our area to a nickel per bottle, which means that that 6 for 78 price has 30 cents added onto it.

Now, that means that 6 for \$1.08—now if that housewife brings it back, she got a reasonable value, but if she does not bring it back,

she really took a beating on a cost per ounce.

And by the same token, as far as bringing the bottle back, if she breaks the bottle, she is out the money. But where this returnable bottle situation gets confusing, in the markets, it will have, "6 for 78 cents." Down at the bottom in small print, it will say "plus deposit."

That little gal goes to the checkstand and checks out her merchandise thinking, "I have got 6 bottles of Coke for 78 cents." And, as it is going through the checkstand, a 30-cent charge pops up. A lot of times, they

are not even aware of that.

Mr. Bangert. Well, then, I guess if the chains—if it costs the chains or any grocery store a cent and a quarter to a cent and a half to handle the bottle that cost is obviously passed on to the consumers someplace

along the line either in soft drinks or someplace else.

Mr. Heckenkamp. Well, it has to be because they, the chains, I think it is very well known by most everyone, do not have a large net profit. It has to be covered somewhere. I would assume that the pricing of either other commodities would be adjusted—it has to come out somewhere, yes. And that is why they are not particularly happy about returnables.

Mr. Bangert. I have no further questions, Mr. Chairman.

Senator Harr. Mr. Chumbris?

Mr. Chumbris. Thank you, Mr. Chairman.

I still want to get back to the point that in this country, yes, within our defined laws each business and each industry makes up its mind how it will think best to run its operation.

And in the soft drink, they have their system of distribution. Maybe in other companies, they do not. They encounter a different system.

There is only one other question I wanted to ask you, and that is, you stated in your testimony that you made the negotiations to buy the Taft Coca-Cola Co.?

Mr. Heckenkamp. No, I did not make that statement. Mr. Chumbris. You entered into some negotiations?

Mr. Heckenkamp. No, I did not make that statement. I did enter into negotiations with them—to buy products, to buy products, not the franchise.

Mr. Chumbris. To buy what?

Mr. Heckenkamp. Product, not the franchise.

Mr. Chumbris. To buy product.

Mr. HECKENKAMP. Right.

Mr. Chumbris. What type of product? Mr. Heckenkamp. Coca-Cola product.

Mr. Chumbris. And in what way? I mean, what kind of relation did you want to enter into with them?

Mr. Heckenkamp. With Mr. Foster?

Mr. Chumbris. Yes.

Mr. Heckenkamp. The fact that we were a broker, his merchandise into the Los Angeles area through a distributor that was in his territory, which, if you read most of the contracts, at least what I have seen, a lot of them provide for a franchisee to have distributors.

Now, they put no restriction, to my knowledge, on who those distributors are other than they should be approved by their parent

companies.

So it is being done every day. A man in Montana is selling to a little distributor that is 200 miles away from him. He flies down to see him,

but his truck takes the merchandise down to him.

Now, that was our position at that point. It was that we would broker that merchandise into the Los Angeles area, but the distributor was located in Taft.

Mr. Chumbris. Did you know enough about Mr. Foster's operation to determine whether the value of that operation or whether the oper-

ation was being developed to its fullest degree?

Mr. HECKENKAMP. No. I do not feel I had that information. At that point, I did not know what his capacity was as far as production. He knew he could not produce cans because he made that statement, but most of the small bottlers do not produce cans; they buy them from San Leandro and truck them to his area.

Mr. Chumbris. I understand that there was a case in court where

you appeared as a witness.

Mr. HECKENKAMP. Uh-huh.

Mr. Chumbris. I understand that there was a case in court where you appeared as a witness and you testified as to what the value or you heard testimony, or you participated in colloquys which indicated the value of Mr Foster's operation in Taft.

Mr. Heckenkamp. That would be—yes, we did testify at some hear-

ings. This is all theoretical as far as what the price is.

In any shape of the imagination.

Mr. Chumbris. Well, I understand the actual value or anticipated value of that property was part of the evidence in that case.

Mr. HECKENKAMP. I do not recall what that figure was.

Mr. Chumbris. Well. Mr Chairman, if we can get transcripts of that testimony that is pertinent to this hearing. I would like—see it inserted in the record.

Senator HART. If no objection, that will be done.

Mr. Chumbus. I have nothing further.

Mr. Heckenwamp. All right, fine.

Thank you, Mr. Chairman.

Senator Hart. Thank you.

Before you begin, I believe I indicated yesterday—and I wish to repeat for those who were not present, that at some point during the morning—I would have to take a recess. The executive meeting of the Commerce Committee has been called.

There is one bill I am responsible for in that meeting. The staff of the committee will phone and let us know when I should break off here. Let us plan to continue until such call comes in. And then, fol-

lowing that executive meeting, we will resume here.

Senator Harris.

## STATEMENT OF U.S. SENATOR FRED R. HARRIS

Senator Harris. As I understood that part of the testimony that I just heard as I came in, I agree with it very much. I particularly like the emphasis on competition, and on the free enterprise system. There is a lot of lip service paid to the free enterprise system and competition in this country by those who don't act in accordance with what they profess to believe in.

This legislation involves making exceptions to existing laws, and it should be considered very carefully. Why are we being asked to act

on this bill?

First, we should ask if this bill benefits the consumer, who pays \$5 billion a year for soft drinks. According to the Federal Trade Commission, the geographical restrictions on the marketing of soft drinks cost the consumer up to \$1.5 billion a year in overcharges.

In other words, if independent bottlers are released from geographical limitations and are allowed to expand and compete for the share of the market that they can adequately serve, the Federal Trade Commission estimates that the price might fall as much as 30 percent. That's a 3-cent reduction in the cost of each 10-cent bottle of Coca-Cola, for example.

This bill would legitimize the franchise system, which now drives the price of bottled soft drinks up and stifles competition among bottlers. The bill would deny the consumer the right to buy soft drinks at a lower price, one which more accurately reflects their market

value.

The bottlers' association has charged that the result of breaking up the franchises will be vicious competition that will drive out many of the smaller, independent bottlers, leaving the corporation-owned bottling plants in control of the market.

Vicious competition, Mr. Chairman, is synonymous with any kind of competition to a lot of people, especially when a noncompetitive industry is being ordered to get competitive and work for its share of

the market.

In fact, the soft drink industry is highly concentrated while the Federal Trade Commission's ruling only affects one aspect of its con-

centration, the franchise question.

Meanwhile, many large bottlers, including such conglomerates as Westinghouse Electric Corp., Beatrice Foods, Illinois Central Industries, and General Tire and Rubber have purchased bottling franchises

for two or more supposedly competing brands.

Obviously, a Coca-Cola bottler, who also bottles for Canada Dry, is not going to cut Canada Dry's prices in order to attract more customers. Not only is the consumer forced to buy Coke at a universally high price because of monopoly marketing practices, but often he or she is unable to find any competing brand name soft drinks at lower prices, and that's with a guaranteed territory.

We have been told by the Bottlers' Association that should the Federal Trade Commission case be successful the result would be the demise of thousands of small bottlers, family businessmen, who will

be wiped out by the larger bottling companies.

We also have been told that it is the small bottler who makes soft drinks available to the smaller, less profitable, retail establishments,

and if the Federal Trade Commission regulations were to go into effect, the larger bottlers would come in and take away the large chain

stores, which are more profitable to service.

This supposedly would drive the small bottlers out of business and leave the small retailers to get their stocks from middlemen. The lobbyists for the soft drink industry charge that these small store owners would have to pay the large bottlers more for the same service which they now receive from the independent bottlers.

In fact, Mr. Chairman, the geographical restrictions that Coca-Cola places on the independent bottlers inhibit their ability to be efficient and to obtain an adequate share of the market. As a result of this, the number of bottlers has dropped sharply from 5,200 to 2,300 in the last 25 years. Many independent bottlers have such a small area to service

that their plants are not producing at capacity.

The bottling industry is not largely made up of small businessmen as the soft drink manufacturers would like us to think. The Federal Trade Commission report points out that the 21 largest Coca-Cola bottlers service over one-half of the population of the United States.

accounting for about 24 percent of soft drink sales.

The 10 largest Pepsi bottlers serve 45 percent of the population, and distribute 8 percent of the total sales of all soft drinks. Under this legislation, Mr. Chairman, the large bottlers would be free to acquire other operations under the antitrust laws, and decrease the number of small independent bottlers even further.

This legislation is, therefore, harmful to the small bottlers because it leaves them wide open to the big bottlers, and makes it illegal for them to try to take away some of the bigger bottlers' territory through

price cutting and more efficient practices.

The Federal Trade Commission report on Senate 3040 states that the number of small bottlers may continue to decline, but because they will be forced out of business by artificially small distribution areas. Removal of the restrictions will leave independent bottlers free to merge and form middle-sized operations that would benefit the most from economies of scale.

It should be the free market that decides which businesses shall succeed and which businesses shall fail, not some corporate vice presi-

dent in Atlanta.

The Federal Trade Commission ruling which this bill would overturn only reaffirms our basic faith in the free enterprise system that has made America great. It should be the man who works the hardest or the woman who works the hardest, who supplies his customers well, and whose product is the best, who succeeds, not the person or corporation who can put the most pressure on its competitors to withdraw.

As for the charge made by the Coca-Cola Bottlers' Association that only chain foodstores would benefit from the Federal Trade Commission ruling, it is obvious that the artificially small boundaries imposed on the independent bottlers are incompatible with modern food retailing practices. The majority of small retailers obtain their stocks of other food products from central warehouses that cut across the very regional lines to which the small bottlers are confined.

If the small bottlers were able to supply these same central warehouses with soft drinks, the smaller retailers would be able to get all their supplies at the same source. That would save money and be able to compete more efficiently with the chainstores.

Thus, none of the charges that have been made concerning the Federal Trade Commission ruling are true. Why, then, are we con-

sidering this legislation?

Why should soft drink manufacturers be exempt from the antitrust laws? If every industry that mounts a special lobbying campaign to get around the law is as successful as Coca-Cola, why don't we repeal the antitrust legislation now and save ourselves time, instead of enacting a special exemption for each industry. The Coca-Cola Bottlers' Association has sent small bottlers to Congress to plead the cause of the large bottlers.

The executive director of the Coca-Cola Bottlers' Association, John S. Knox, has sent six separate prepared letters to each of its members as samples of the letters that might be written to congressional delegations. Quote: "Even though you might have written them before, you might want to write them again to emphasize your feelings about this most serious matter," Mr. Knox explained in his cover

letter.

The Coca-Cola Bottlers' Association has levied an assessment on its members as a franchise defense fund to lobby against the Federal Trade Commission proceeding.

Its members have been provided with fact sheets and legislative analyses so that they can convince their Congressmen to introduce

legislation to protect the franchise system.

The bottlers association has flooded congressional offices with mail and visitors. Simply because of its immense size, Coca-Cola, for example, is able to lobby every Senator and Congressman within and from his home district.

Some have suggested that the influence of Coke is more extensive than that of the American Armed Forces. In any case, the company blankets the United States with about 900 local bottlers, more than enough to cover every congressional district. And the importance of that, Mr. Chairman, is that, under the franchise system, those bottlers are responsible directly to the home office.

Now, the vice president of the Coca-Cola Co., Mr. Ovid Davis, has sent the members of the Council of Coca-Cola Bottlers, a memo dated July 11, 1972, reminding them to make friends for their

industry.

Mr. Chairman, I will furnish that memo to you for the record.

Senator Hart. Yes: it will be admitted into the record.

(The document follows:)

All across the country-

the memo states—

new men and women are standing before the people to be selected as Representatives and Senators, Congressmen, Mayors and County Commissioners, These people are in need of your help now. They need your active support. And in January they will remember who were their friends this summer. In short, it is time to remember your old friends and to make new friends.

Mr. Chairman, we all know that it is against the law for corporations to contribute to political campaigns. Yet, we also know that corporations avoid this provision by organizing contributions by their execu-

tives. This memorandum from Mr. Davis seems another excellent

example of how this is done.

It shows why corporations have so much political power. For with their net of corporate communications which cover the entire United States in the case of large firms like Coca-Cola, they are able to mobilize pressure on virtually every Member of Congress. No individual citizen is able to do this. Even national consumer groups have only a fraction of the power to influence Congress.

This bill is special-interest legislation. It is not in the best interests of the consumer. It is not in the best interests of the small bottler. It is not in the best interests of the citizens and of the political process of the United States because it merely responds to the political power resulting from the tremendous economic power inherent in the franchise system. This bill will result in the enrichment of a few large multibrand bottlers.

The soft drink industry is highly concentrated now. Their practices are costing consumers up to one and a half billion dollars a year

in overcharges.

I hope that the committee and the Senate will not approve what I

consider to be such a one-sided piece of legislation.

Senator HART. The Senator from Oklahoma has never been charged with being obscure or tentative in any of his public expressions, and you certainly do not make an exception this morning. I am one who regrets very much that you have decided not to seek reelection.

Senator Harris. May I say, Mr. Chairman, I appreciate that very much. However, I believe people are like snakes; they ought to shed their skin every so often, and I have recreated my life every now and

then at intervals of about 8 years.

I believe that many people such as yourself and others can stay in the Senate forever without losing their zest or compromising their integrity. But every now and then I think it's good for me to move

into other spheres.

I have always felt that a Member of the Senate had two responsibilities; one, to work within the Senate; and two, to try to change the climate within which the Senate operates. Always I have tried to operate in both spheres as a member of the Kerner Commission, running for President, and other ways.

Now, I intend to spend most of my time on the latter—trying to help lead a citizens' movement on many of these kinds of issues, which I

think are bigger than the question of what a bottle of Coke costs.

I think they have to do with concentrated economic and political power, and I think they are at the bottom of so much of the pathological stress and strain that we see in our society.

Senator HART. With that brief explanation, I think I ought to modify my earlier expression. Maybe we will be better off in our

society.

Senator Harris. A lot of people feel that for other reasons than I

articulated [Laughter.]

Senator HART. Well, you are a hell of a man, and I want to put that on the record.

Schator Harris. Thank you, Mr. Chairman. Thank you very much. (Exhibits follow, Testimony resumes on p. 370.)

Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C. August 11, 1972.

Hon. PHILIP A. HART,

Chairman, Subcommittee on Antitrust and Monopoly Legislation, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: I was most appreciative of the opportunity to appear before your Subcommittee on August 9th in connection with its consideration of S. 3133 and similar bills and wish to particularly thank you for the courtesy

extended to me.

I was not able to be present for the full day of hearings on August 10th, but I understand that Senator Harris testified before the Subcommittee on that day and that the statement he submitted for the record included an excerpt from the Congressional Record of April 11, 1972 in which he alleged that I, among others, have been guilty of improper lobbying activities in connection with the above legislation, and which also included a copy of his March 9, 1972 letter to the Acting Attorney General on the same subject.

Under the circumstances, I would be most appreciative of the opportunity to have included in the record of the hearings, following the testimony of Senator Harris, the enclosed copy of my letter of April 24, 1972 to Senator Harris in which I responded fully to his allegations. As you will note, a copy of that letter was

also sent to the Attorney General.

Thank you for your consideration in this matter.

Very truly yours,

EARL W. KITNER.

Enclosure.

ARENT, FOX, KINTNER, PLOTKIN & KAHN. Washington, D.C., April 24, 1972.

Hon. Fred R. Harris, U.S. Senate, Washington, D.C.

Dear Senator Harris: An article in THE WASHINGTON POST of Friday, March 10, 1972 brought to our attention the fact that you have requested the Department of Justice to look into alleged violations of the Federal Regulation of Lobbying Act by the National Soft Drink Association, by the Coca Cola Bottlers Association and by me. In the article it is stated that you believe that I have been involved in improper lobbying activities by being in direct contact with members of Congress prior to the introduction of legislation which would aid in the soft drink industry without having registered under the Act and your statements in the Congressional Record of February 16, 1972 and April 11, 1972 reiterated that allegation.

In view of these charges, I consider it appropriate that I inform you of the

exact circumstances of the matter.

In May, 1969, the National Soft Drink Association, which is an association representing nearly two thousand soft drink bottlers throughout the United States, requesting me to appear before its Board of Directors to discuss general anti-trust matters. At that meeting, the Board concluded that the Association should retain me as counsel in the anti-trust field and engaged me for this purpose. Our firm undertook legal work in that area for the Association during the remainder of 1969 and, at the request of the Association Board, we continued our work for the Association during 1970.

On January 15, 1971, the Federal Trade Commission aunounced its intention to file complaints against seven seft drink franchise companies (not the bottlers or the bottler associations) on the theory that the named companies have hindered competition in the soft drink industry by restricting soft drink manufacturers (i.e. the bottlers) to designated geographic areas. Such complaints, if filed and successfully prosecuted, would have had a significant adverse effect on the bottler members of the Association by eliminating territorial arrangements.

some of which have existed for more than three-quarters of a century.

During the Spring of 1971, the Association, through a special committee appointed by it, and through the Association Board, considered the legal implications of the proposed complaints, including the possibility and desirability of recommending to the Congress legislation which might save the bottlers from the injury they, in the Association's opinion, would suffer in the event of a successful Federal Trade Commission action, as well as loss in the bottlers'

franchise values during a period of protracted litigation with the national franchise firms. Following the formal issuance of the Federal Trade Commission complaints on July 15, 1971, our firm was requested to prepare, for the Association's consideration, draft legislation and legal analysis which would clearly establish that these longstanding agreements were not in violation of the antitrust laws. Our work for the Association in both the antitrust area generally, and with respect to the preparation of draft legislation, continued through 1971. At no time during the period from our initial employment in May, 1969 through December 31, 1971 was in contact in any way, either by mail, telephone, or other direct communication, with any member of the United States Congress with respect to this matter.

Despite the fact that there is substantial doubt about whether the Federal Regulation of Lobbying Act requires us to submit registration statements in connection with this matter, particularly since the principal purpose of our employment by the Association had nothing to do with legislation, it had always been our intention to file such statements with the Clerk of the House of Representatives and the Secretary of the United States Senate in order to be absolutely certain that we were in full compliance with the Act and such statements were in fact filed with the Clerk of the House and the Secretary of the Senate on January 24, 1972. These filings were acknowleged by the Clerk of the House on January 25, 1972, and by the Secretary of the Senate on

February 8, 1972.

My only contact, prior to the date of our registration, with any member of the Congress in any manner with respect to the legislation being sought on behalf of the soft drink industry took place on January 11, 1972, prior to the introduction of any such legislation in the United States Senate, when our client, the National Soft Drink Association, which I have been advised is registered under the Act, informed me that, in a meeting to be held by Association representatives with Senator Proxmire of Wisconsin on that date, the Senator's office had suggested that I, as Association counsel, be present at the meeting in order to answer any legal questions he might have. I considered it entirely appropriate and, in fact, my responsibility, to comply with a request made by the office of a United States Senator who desired information on a subject with which I was familiar. I, therefore, attended that meeting with Mr. Thomas Baker, the Executive Vice President of the Association, at his request, in order to provide such assistance as I could. I understood from him that a constituent of Senator Proxmire had requested that the Senator consult with the Association's representatives on the matter of proposed legislation, which at that time had not yet been introduced in the Senate.

I can categorically state, without reservation, that I had no other contact with any other member of the United States Congress on this matter prior to the date of the filing of our registration statement. Since such registration, I have contacted one staff member of the Congress and two Congressmen with respect to pending bills sponsored by approximately one hundred and seventy

members of the House and thirty-five members of the Senate.

I can assure you that it has been, and will continue to be, the policy of our firm to fully comply with the requirements of the Federal Regulation of Lobbying Act insofar as they can be ascertained. It is my honest and sincere belief that we did so in this case. Moreover, it cannot possibly be said that any violation of the spirit of the Act took place, since we have never, in this matter failed to fully disclose the client whom we represent and the nature of such representation.

Sincerely,

EARL W. KINTNER.

Senator Harr. Our next witness is the president of Royal Crown Bottling Co., Denver, Colo. Mr. John Alden.

## STATEMENT OF JOHN M. ALDEN, PRESIDENT, ROYAL CROWN BOTTLING CORP., DENVER

Mr. Alden. There are indications that the soft drink industry is engaged in a polemic program to impair the efforts of the Federal Trade Commission who are seeking to effectively enforce the antitrust and monopoly laws of the country.

It has also come to my attention that the FTC is currently operating with the largest budget ever provided for this Government arm.

Certainly, this is evidence of the mandate and mood of Congress. It is hoped that the FPC will not be deterred nor restrained in its actions to best serve all the taxpayers and all the citizens.

My present business operations are based in Denver, Colo. During the past four decades I have been a marketing specialist. Today, I am

a generalist in a soft drink business.

As a marketing specialist, I have been an executive with three of America's largest advertising agencies. I have headed my own management consultant firm. The clients I have served included major corporations in the country, corporations producing consumer package goods \* \* \* ranging from soaps, cosmetics, cigarettes, through the total spectrum of beverages. I have served milk clients, tea, coffee, the wine industry of California and the largest brand selling wine, beers, liquors, and soft drinks.

In the soft drink area, I have been involved with the marketing matters of three of the largest soft drink concentrate houses in the country. They were clients of advertising agencies I represented. I worked with the executive managements of these concentrate houses. I worked on the sales development of their brands. I worked with

their bottlers from coast to coast.

During these years, I also worked with the top management of every major food chain in this country and the provinces of Canada. Because of the growth of the soft drinks as a product commodity in the food chains, I decided to acquire a soft drink plant.

I purchased the Royal Crown Bottling Co., of Denver in December 1968. Contingent on the purchase of this operation, the concentrate house agreed to permit me to can their licensed brands, as well as

bottle them.

The so-called franchise area consists of 10 counties surrounding Metro-Denver trading area. At that time, I also set up a corporation, Interstate Beverage Co., to market additional soft drink brands. Some of these brands are franchised for the Rocky Mountain States; and

others are for national distribution.

As an independent businessman, who strongly supports free enterprise and the competitive profit system that has been built on the freedom of choice, and as a marketing specialist who has watched the soft drink business grow up from half a billion dollars in sales to over \$5 billion annually, and now also as an operator of a soft drink business. I do not believe that legislation is necessary to protect the business interests of the remaining several thousand bottlers with the use and device of "territorial restrictions."

Significantly, it appears to me that a very small special interest group has created a climate of protest to the efforts of the FTC to enforce existing antitrust laws, for a self-serving end. This is a select consortium of concentrate houses who patronizingly call themselves,

parent companies.

There is a different ball game in the marketplace today than records show existed at the turn of the century, at the turn of the century when soft drink franchises with territorial restrictions were set up by looking at county maps and marking them with metes and bounds of partial or multiple-county areas. And this device was used to bait individuals to become bottlers.

Seventy years ago an "exclusive territory franchise" was the selling gimmick of concentrate houses to develop quickly a national distribution pattern, on a city-by-city basis for soft drinks by the concentrate houses, who had brands, but limited operating capital to develop a national marketplace.

At that time the limitations of technological knowhow resulted in some simple production equipment, although laborious to operate, simple packaging in one size returnable bottle, and a trademark licens-

ing agreement providing exclusively in territorial operations.

This enticed small businessmen and tradesmen to make modest investments and become bottlers. And with these modest investments, anyone in a community could become an entrepreneur and a bottler.

And with one or more wagons, and later, trucks, the bottler sold his soft drink item to every possible interested retail outlet in this restricted area. The territory restrictions really meant that there was no other bottler of that brand in town, or around.

Most of his stops and sales were for on-premise consumption. His business was cash and carry. And business bubbled nicely with barrel

cracker foodstores, ice cream parlors, and drugstores.

Then in the early thirties, as part of the scene, there was born, because of the Depression, an interesting type of food operation.

that became known as the supermarket.

The regional food chain operations at that time consisted of a multiple group of corporately owned, really small bantam stores that were rapidly converted into big supermarkets, with tremendous weekly dollar sales requiring more efficient central warehousing for inventory control and costings.

The larger chains built their own warehouses or they bought from area warehouses and big, retail co-op groups. Likewise, the independent supermarkets, and the "mom and pops" had access to these

co-ops, and other area warehouses.

Now, amid the spectacular changes in foodstore distribution and simultaneously, the soft drink industry gave birth to the carry-home carton, multiple-bottle carriers. The big take-home sales volume began to boom, and gravitated to the foodstores; soft drinks became one of the top items in the foodstore on the yardsticks of percentage households buying, total units sold weekly, total weekly gross sales, total profits per foot, and so forth. Today, nearly 3 percent (I believe the last printed figure I saw was 2.66) nearly 3 percent of the supermarkets' total volume is generated by the soft drink section. And the food chains which control the shelf stockings and facing allocations of every one of the sections in dry groceries, for maximum profitability, have the poorest and least control of the very important soft drink section, resulting in many profit leaks. This profit loss situation they would like to correct.

The food industry today is America's largest segment of business, about \$94 billion of annual sales. The soft drink industry sells a major portion of their nearly 5 million cases of pop to the foodstores.

Now, the dog is not interested in worrying about taking over the tail; he already has suppliers of soft drinks as he has suppliers of

all other important products. There is a myth, in our opinion, that the food chains are interested in taking over the soft drink business.

Important sales tonnage on pop is also sold in secondary outlets, and in other areas: Vending machines, premix and postmix. In most of the premix and postmix and the syrup sales, the concentrate houses bypass the bottlers, with multiple distributors, all over the areas where bottlers are supposedly "protected" with "territory restriction."

The food chains do generate tremendous sales tonnage. Also are in high competition in the marketplace, consequently, as reflected in their P&L statements, they operate on the lowest net profit of any type of retail operation in America; generally less than 1 percent.

This means that foodstore executives must and do study costs carefully. For years they have struggled with the problem of handling and sorting returnable bottles. Studies, as you have heard in earlier testimony, show that the cost of handling returnable glass runs anywhere from 10 to 24 cents per case. Now, at 10 to 24 cents a case, we have roughly estimated, that there is an attrition on the gross profit that a retail chain makes of about 6 percent.

The retail chains operate on about an 18, 17, 19 percent gross profit margin, which means that if an item delivers less than that, such as cigarettes, they need a lot of tonnage to end up with some total profit

dollars.

And then, of course, the cost of handling becomes very important. The chains, therefore, have one interest in soft drinks, how to sell them more efficiently in their stores, more competitively priced, giving the consumer the benefit of best value. Food chains have built their tremendous business on selling the concept of value and selection of products, to its consumers.

Food chains welcomed the packaging developments of cans and one-trip bottles for pop. And the convenience packages, cans and one-trip bottles also were welcomed by the store traffic, the consumers.

Despite the many surveys and studies that have been released \* \* \* the consumer may say she prefers a returnable bottle, but that little fat fist reaches for a convenience package in many, many cases more often and takes that convenience package through the checkout counter.

However, the concentrate houses have convinced the bottlers—and I say the concentrate houses have convinced the bottlers because I helped do some of that selling job in years gone by—that returnable bottles, which originally built the bottlers' business was the only way to go; despite the fact that there is a continuous growth of dominant share-of-market by convenience packages, cans and no-deposit glass.

One of the best index figures, in my opinion, is the volume of cans produced by the canmakers, and the nonreturnable glass tonnage made by the glassmakers. They are the ones that know what they are selling in returnables, and in nonreturnable glass. Their figures show there is a continuous increase in the nonreturnable glass, and a continued dipping in returnable glass production.

For years, the foodstores served by central warehouses have sought for soft drinks to be delivered to warehouses. That's the way they are

used to doing business.

They do not like in-store vendors. They have put their efforts in getting cookies, crackers, potato chips into warehouses: because the

more suppliers that come in through the back door with product and come in through the store, the more complicated is their problem of handling and controlling their shelf space for maximum profits.

The most valuable thing a food chain has is shelf space, because off

that shelf space moves merchandise.

We feel that in their search for soft drinks to be delivered to the warehouses, the convenience packages best serve that need. However, concentrate houses urged bottlers not to sell the central warehouses and, in some cases, including our own, forbidding the bottler to sell to a warehouse.

The contention is that a warehouse selling results in soft drinks spilling over into another bottlers' territory. The small bottlers are restricted, but the large bottlers have been permitted by the grace of the powers that be at the concentrate houses, to sell the warehouses.

This hurts the small bottler, who has no retaliatory action or procedure that he can take. One major chain informed me that it finally was permitted to sell two major brands of soft drinks in one of their warehouses, only when that chain agreed to sign stipulations that it would not sell these brands to a large group of their stores located in other bottlers' "restricted territories."

This put quite a hardship on this major food chain and it was rather surprising that they would agree to sign such a stipulation. They did that because of consumer call for product. Again, this is the free-

dom of choice, and the consumer at work.

One division of a major chain has to deal with 43 bottlers of a leading cola to service 160 stores. The division is the division of the largest food chain in the country today. They are very good merchants. They have built their way from a small chain, regionally, to a dominant national operation.

However, they cannot promote this important cola brand because each of these 43 bottlers had different sizes, different types of packages, different prices, all of which discouraged chainstore promotion of the brand. Chainstores do like to promote items that bring in traffic,

and soft drinks do.

These frustrations lead chains to decisions to have their own store brands, and it's a very simple thing. They have them custom-packed and delivered to their warehouse. They have been seeking producers of local and regional brands to supply their soft drink needs in the type of packaging they desire in the central warehouse.

With their own brands, chains have eliminated problems and have been able to offer the consumer a better value, with larger pack-

ages, lower shelf prices, and a far better price per ounce.

On the other hand, the consumer still, discriminatory as she is—and let us not think that the consumer today is not sophisticated—she still does like to make her choices, has purchased heavily of store brand soft drinks. Many of the major chains in the country have now gone into unit pricing, which pretty well succinctly articulates the cost per ounce—not only in soft drinks, but in soaps and cereals and right across the board. It is very interesting in store observation checks that we have made, that with the freedom of choice, many consumers are not interested in how cheaply or how lower cost per ounce is involved; they are interested in what they think is value, which involves the organoleptic gratification they get out

of an oral intake of a bottle of refreshment, and they decide what they think that value should be in terms of price, and what brands.

So we don't think the issue of how much it costs per ounce in a returnable or a can is really the issue. It's what the consumer wants that's the issue. And if a consumer that can't afford a Cadillac wants to buy it, and it's repossessed, that's the consumer's problem. But the Cadillac is there. The Ford is there. The compacts are there. The consumer has a freedom of choice, and should have.

In recent years, new corporate entities have invaded the soft drink industry. They have been purchasing plant and franchise operations in one or more trading areas. As a Senator just momentarily recapped, these newcomers include some very important corporations

listed among the top 100 in America.

There are also many consolidations and buyouts by the large soft drink bottler companies, who are further pressuring small bottlers already in their death throes or in a struggle for sustained, economic life.

With or without legislation to amend the antitrust laws, and to provide "restricted territories" for bottlers, many bottlers will be going out of business, because they cannot compete with necessary

top production efficiency and marketing know-how.

As a Senator has pointed out, over 50 percent of the bottlers who were in business two decades ago are out of business. And the rate of attrition is not slowing up. It will not be affected even with the maintenance of "territorial restrictions" because in the past two decades nearly two-thirds of the soft drink bottlers have already gone out of business.

Territorial restrictions did not save them. Conversely, there is no single evidence that removal of territorial restrictions in compliance with antitrust laws, that the mortality rate will be severely stepped up. Actually, it will enable all competent, small bottlers to stay alive.

And that's the name of the ball game.

Consider the fact that it is estimated that 40—only 40—individual bottling companies in the country today account for over one-third of the total soft drink sales. And that the industry estimates are that major concentrate houses own and operate at least 25 percent of the bottling plants in the country. This was stated in a trade journal just a few weeks ago, the Beverage Industry, issue of July 14, 1972.

One learns that many of the big bottling plants are owned by the concentrate houses, and another group of large bottling plants are owned by corporations whose assets are in billions of dollars, more assets than any concentrate company in the country has. There are corporation giants that own soft drink plants with a cashflow

bigger than many of the concentrate companys' net worth.

These giants have know-how to operate in the free marketplace. They certainly don't need mythical protection of "territorial restrictions." Competent businessmen, big or small, don't require restrictions to survive; they fight restrictions. And the consumer is entitled to a freedom of choice. So is the food industry. The country's distribution specialists know how to develop product availability at the lowest consumer price without territorial restrictions.

In the early days of our country, our big problem was production, efficient production. When we licked production, our problem was

profitable distribution of that production. And the force that has made our country so affluent is the ability to bring products to a marketplace efficiently, economically, and to satisfy the consumer's desires.

In building distribution, the specialists know the importance of the efficient warehouse pattern of product selling on packaged goods. The archaic franchise system may or may not have sufficient household population in the area to support a profitable bottler and canner

operation.

And, if that is the case, no legislation urging territorial restrictions can keep that man alive. There is not sufficient business in his marketplace. I am headquartered in the Rocky Mountain States. I was not here when the Wyoming Senator was speaking of his area. But I know the Wyoming market very well. We have seen what has happened to it. The little bottlers have gone out of business because there isn't the kind of volume necessary to support an efficient plant and to show a profitability on needed capital investment.

We have seen the bottlers up there interchange brands. One man is a bottler in Cheyenne and the other bottler in Casper—or in Laramie—becomes a distributor. And then the bottler in Casper has a distributor in Cheyenne, all of them trying to feed each other with

more products.

Now, that illustrates that if you have enough tonnage, and you have multiple brands, you can feed the marketplace and sustain a business—

but not with territorial restrictions.

The restricted territory franchise is not the answer. We were going to buy a franchise in Cheyenne, and we found out they had another franchise brand that was being produced in Denver. And we were told if we bought the franchise in Cheyenne, which was a multiple franchise operation, that this one brand franchise was not available. We were planning all of our production in Denver, in order to enjoy the highest production efficiency price for finished product at the most favorable price to the consumer.

We were informed we couldn't do that because there was another company bottling the same product in Denver. Even though this company wasn't selling in Wyoming. The double talk of territory restrictions. So we passed on that franchise, and that company is no longer in business in Cheyenne; it's being serviced now by a little bottler out

of Fort Collins, which is about 40, 50 miles away.

What protections do territorial restrictions provide, then, if there is not sufficient business in a franchise area to support a costly, modern,

and efficient plant?

The concentrate houses know this. They have had game plans and programs, which they are implementing on a long-term basis, maybe a short-haul basis, I don't know the timetable precisely in which they very definitely plan to concentrate the industry with major production centers and major distribution centers.

This concept in itself, but to work, eliminates a lot of small bottlers. At best, it permits that little bottler to become a distributor, and just a distributor. What does that have to do with territorial restrictions?

We think it is only a matter of time before supermarket purchases of soft drinks will have to be totally serviced, at the central warehouse. We are also convinced that every major concentrate house. in the confines of their own offices agree. The strategy question is, what the hell do we do about it?

At the moment concentrate houses are frozen with a lot of franchise agreements. If all the franchise contracts could be washed out tomorrow, I believe the major concentrate companies would happily go ahead and operate unburdened, free of smaller bottlers. But, at this hour, the courts are honoring the validity of the bottlers trade-

mark licensing agreements.

They may say, "This man has paid for this franchise. You just can't throw him out the window. He has some equity in it." And if you add it up, and laminated all these sums of money, this involves sums of money too big for even the largest concentrate houses in the country to pay off on. Therefore, another strategy and alternate must be developed. Chalking off these small bottlers, driving them out of business, with territory restrictions consider another myth, the matter of store-door service. Before soft drinks became as important as they did, a very important distribution segment, servicing the food stores in America, were known as wagon jobbers. They were very important in the distribution system. These wagon jobbers in the country have virtually disappeared because of the high cost of direct-to-store service.

And on route sales today, younger men want an easier job than route sales. In the olden days when the soft drink business first started, the man who owned the business didn't mind getting out in that

wagon, or out in the truck, and pushing around 35-pound cases.

But the young men today who may not own the business, and are only employees tire of the hard work and look for greener pastures. In our own market we find out they feel there are probably easier gains to be had on welfare than to work hard all day and get a minimum guarantee and commission, which most route salesmen get.

Today, union pay scales and heavier urban mobile traffic has made the cost per case of soft drink sold, delivered store by store, prohibitively high. These high costs are passed on to the consumer with higher prices or else the route operator has to close his doors. Direct to warehouse sales is necessary, but restrained by present territory restrictions which works against the small bottler and favors the giant bottlers because the warehouses are based in the major bottlers territory where the small bottler is now barred.

In New York, a few years ago, the largest route operator and wagon jobber, with annual sales of \$55 million, calling on 11,000 foodstores a week, went out of business because they could not fight the costs of

operating the mobile fleet of several hundred trucks.

This, in my opinion, was one of the most efficient operations in

store-door selling, and they couldn't cut the mustard.

In California, for example, there are many problems. The clerks' union say you can bring the product to the store, but you can't bring it into the store, or the clerks' union say you can bring it into the store; or you can bring it up to the shelf, but you can't put it on the shelf. All of these things are forcing chainstore thinking to say, well, if we still have this labor, it is much cheaper for them to bring it right into our warehouse. Yet the chains are being fought on this by the soft drink operators.

It appears that there is a grand game plan being played by the concentrated houses in which the remaining small bottlers are pawns. I don't like to think of myself as a small bottler. I don't think I am a big bottler. I am a businessman in the soft drink industry as a bottler. I have attended bottler and concentrate supplier meetings. I think there is a lot of brainwashing going on.

I think there are a lot of things that have been masterminded by some good thinkers, harnessing these thousands of small bottlers and using them for an expediency. And when that need is no longer there. I think the small bottlers will be discarded \* \* \* dumped as fast as

legally possible.

Every major concentrate house has already set targets and time schedules for the consolidation of production and distribution of their major brands concentrated in major trading areas where the foodstore warehouses are located. The clue is in the hurried efforts during the past year to structure production centers and distribution enclaves in major marketing areas, and the emphasis there is on the warehouse profile rather than the old geographical county lines on which franchise areas were crudely structured.

In other words, the concentrate houses are "getting on the ball" so territorial restrictions can be ignored if they are still in effect. To me, it looks like an adaption of the cartel system used by European cor-

porate grants to divide the world market among themselves.

I think we now have in this country a version of the cartel method of allocating marketing areas, which will end up being shared by not more than 100 or 200 major bottler-canner companies, at most, and any remaining bottlers, still alive, will be doing yeomans work as distributors for the key bottler and canning operations in the hands of a few giants.

We strongly urge your committee to consider the fact that legislation to bypass the antitrust laws and to eliminate the FTC efforts to uphold the antitrust and monopoly laws, would be serving a tightly knitted, small, special interest group with self-serving purposes, that will not stay the lives of bottlers who have outlived their place in

the soft drink structure.

Conversely, removing the territorial restrictions will provide a healthy competitive climate where good businessmen among the thousands of smaller bottlers will prosper and consumer prices will be

lower.

The continuance of territory restrictions only burdens and penalizes the competent marketing enterprises, and provides but a temporary haven for small bottlers who cannot survive in the free and competitive marketplaces. At the same time, forcing the consumer to pay premium prices on what is today the most popular beverage in the American way of life.

As one of the few voices in the soft drink industry to speak up for elimination of territory restrictions, I do so fully aware of continued harassment, and possible additional reprisal actions and economic sanctions that may be initiated against my operation by con-

centrate house interests.

I already have been instructed by one of my concentrate houses with whom we have a trademark license, to whom we can sell to, right in our own franchise area. They are unhappy because we are

selling a distributor who resells the product where they wish to, and this distributor sells to food chain warehouses in the Western States. Consequently, several weeks ago, I received a registered letter from the senior vice president of the same concentrate house, crisply informing me that our canning franchise has been terminated, without cause. At the same time, another vice president informed me that we could buy finished can products in the future from another bottler, a bottler owned by Beatrice Foods who cans in our own so-called exclusive territory. Further, that we were placed on a quota based on a modest increase over last year's can sales.

Senator Hart, I ask you and your committee, who is kidding whom? Suddenly, we have had a barrage of complaints from quality control executives at this concentrate house, with veiled intimidations that

our franchise might be in danger.

We have some other franchisers who tell us that their laboratory

findings on quality control on our products is excellent.

Now, while this is going on, we have another small bottler who is actually running trucks into our so-called restricted territory franchise. He is "stealing" our glass, which we bought and have out there on bottle charges. He is "stealing" them, and I say that in quotes, because he is paying only bottle deposit, rather than the price of glass. He is selling our customers at cut prices. He is deteriorating the orderly marketing of products, and the concentrate house has done nothing in the matter of "territory restrictions."

We purchased the soft drink plant and the franchise brands in Denver because we planned an area distribution program. We deliberately planned our program to go through chains and warehouses because this is where the industry is going to go, whether it takes 6

months, 6 years, or some more indefinite time.

We are convinced that warehouse selling, normally, ethically, and legally, is where the business belongs. We also feel that we should determine our own pricing structure, our own product mix, and our customers, the kind of distributors we sell to in our marketplace without territory restrictions, and to the retailers we want to without territory restrictions.

We now find out that ain't so. I am familiar with the existing antitrust and monopoly laws because of my experience with big corporations. I consider these antitrust and monopoly laws, guidelines for

sales development programing of my business.

And these laws, I thought have been strengthened by several Supreme Court decisions. As a businessman, as a citizen, as a taxpayer, I am a little confused, because at this hour there are flagrant violations of the Sherman and Clayton Antitrust Acts, the Robinson-Patman bill, which is extent. There are unfair trade practices; and restraint of trade prevails. There is stealthy price fixing. And the bottlers are pounded by an elite corps of concentrate suppliers, simultaneously brainwashing them, and dulling the senses of most bottlers who have already outlived their economic worth.

I urge your committee to consider the fact that the soft drink industry and the consumer is well protected today with the relentless enforce-

ment of present day antitrust and monopoly laws of the land.

Enforcement by FTC in the elimination of territorial restrictions will, possibly after a short, temporary chaotic uproar, will stabilize the soft drink industry and serve the consumer better.

It is interesting—some time ago, not too long ago, within the past year—one of the national concentrate houses decided to eliminate territorial restrictions. We talked to many of their bottlers. Nothing has happened. No one has gone out of business. Business continues as usual from day to day. Why is this hushed?

We don't think legislation is necessary to amend the antitrust laws on restricted territories, to protect anyone, except the vested group who now already control 90 percent of the Nation's cola beverages, and about three-quarters of the entire soft drink volume in the country.

In our opinion, such legislation would further trend monopolistic

tendencies.

In summary, the several thousand small franchised bottlers can survive better if the present laws of antitrust and monopoly and fair trade

practices are enforced by the Federal agencies.

Any new congressional laws, lobbied for and initiated by the elite special interest group, will merely accelerate the demise and more quickly eradicate the small bottler from the soft drink industry.

Thank you.

Senator Hart. Thank you, Mr. Alden.

You have concluded your prepared testimony at just the right moment. I received a call and must get up to the Commerce Committee meeting. Because we will have questions to direct to you, I hope you will be able to stay.

I will have to interrupt here and take a recess. Will you be able to

stay for questioning?

Mr. Alden. Today? Senator Hart. Yes, sir.

Mr. Alden. Yes, sir.
Senator Hart. Let me suggest a recess of 1 hour, to resume at

(Whereupon, a recess was taken at 10:30 a.m.)

Senator HART. We will be in order.

Mr. Alden, before we begin the questioning, I should add to what time persuaded me not to add before the recess, that your testimony was very interesting, and I think all of us will have many of the points, that you made, clearly in mind when we make the decision on this proposal.

Mr. Bangert?

Mr. Bangert. Mr. Alden, during the course of the hearings, witnesses have indicated that if we do not have the exclusive territorial franchises system, and if prospective franchises knew that they didn't have that closed territorial system, they would not go into the business.

But yet, in your statement, you seem to say that the reason you went into the business was because you sort of felt that eventually the territorial system of exclusivity would fall and that this would be the thing that would give you success.

Do I misread your statement or is that your feeling?

Mr. Alden. No. I will repeat that statement, and that is what I went into the soft drink business because soft drinks became a very important segment of food store sales, nearly 3 percent.

And because it was the important marketing area for food stores. I felt that the soft drink industry had to recognize the importance of

this major segment of distribution and would eventually come into warehouse sales, and in doing that, they would have to negate the strong position on territorial restrictions.

Now, when you refer to new franchisees, I do not think I read you right. Did you mean people who are interested in becoming franchise

companies?

Mr. Bangert. Yes, sir.

Mr. Alden. Well, at that point I do not think it is a matter of new franchisees. I think it is a matter of companies who are seeking the licensing of a trademark and to make and distribute the products. And I do not think territorial restrictions are an issue.

If a man cannot license a good brand name and make money with it, he should stay away from it. And he should evaluate the calculated

risk he has to take in the open marketplace.

This means that newcomers could come in successfully if they had the capacity financially, know-how, and could handle production, and win their place in the marketplace, meaning the foodstores, the ware-houses, and other outlets.

There may be new principals coming in that may see an opportunity without territorial restrictions to service the bowling alleys, the little mom-and-pop stores. They may decide they can do that efficiently, and,

if so, they should be welcomed as small businessmen.

Mr. Bangert. Well, that is one of the points that has been, again, made during the course of the hearings, that if you do not have a law such as the one that is being considered now, and if the territorial restrictions are removed, there will be nobody to sevice the bowling alleys and gas stations and laundromats and restaurants, et cetera.

Do you have any feeling about this?

Mr. Alden. Yes.

At the start of the soft drink industry's franchise program, 70 years ago, they did not have to worry about gasoline stations, because there were no gasoline stations. And as gasoline stations became spotted and indicated an opportunity for distribution, aggressive people in the marketplace sought ways to get distribution and product in there.

Now, I do not see where restricted trade has anything to do with the

bowling alleys and the restaurants and the small mom and pops.

It seems to me that with the distribution apparatus now existing in the country, that anyone that wants any kind of a product can get it, providing he wants to buy it.

There are a lot of little tobacco jobbers running around selling chewing gum and cigars and cigarettes. Yet the cigarette business has gravi-

tated to the food chains.

Some years ago, the cigarette's primary point of distribution was the tobacconist.

And so as time goes on, there is more population, the distribution patterns change a bit. And it seems to me that a man who wants to stay in business, or a corporate entity that seeks to make profits, has to be able to evaluate these marketing conditions and take advantage of what exists or add some supplemental muscle.

Mr. Bangert. Well, I guess, again, that one of the things that proponents of this bill are worried about is that you, for instance, located in Denver, would ship or would sell to warehouses of the chains and those warehouses of chains would, in turn, serve the Utah area, the Wyoming

area, other areas, where they are now being served by individual franchisees; and that without this cream business, the bottlers in Wyoming, or Utah, will not be able to survive.

What is your reaction to this?

Mr. Alden. You state they were worried. I wonder if that is their argument rather than a matter of great concern.

We happened to have lived intimately with problems in Utah and in

Wyoming, and I do not see any such concern.

Business is a push-and-pull action. If we sell, let us say, in Boise, Idaho, and the local bottler cannot compete, it is interesting that the Salt Lake bottlers did come in and compete.

And when the Salt Lake bottlers obtained orders at a lower price and we passed—the consumer was still getting the benefit of lower

prices.

We, as businessmen, have to know how to deploy our dollars, our knowledge of markets, and we see no reason for dumping product.

We have sold warehouses and, as a rule, our prices are higher than

the other brands.

In the largest chain in Denver, our cans sell for 10 cents a case more than some other brands because we priced our product, based on our cost and our needs for marketing money availability for distribution and promotion. Yet, we still had to keep in mind that we had to be competitive at consumer level, and we have to give the retailer the kind of a profit he likes.

So, if our judgment is bad, we get washed out of the marketplace by the natural forces at work, not legislation. And we feel that legislation is not necessary to protect a weak or inefficient businessman.

And we think the system with restricted territories has protected a lot of them. At this point, I think everybody realizes that territory restrictions are doomed. The question is, how soon will territory restrictions go by the boards.

Mr. Bangert. So, I take it then, it is your opinion that—we have been told, for instance, by the PepsiCo Bottlers Association that if exclusive territories are eliminated, the Pepsi distribution would end up in the hands of about 50 people.

Mr. Alden. My answer to that is that probably it will anyway, even

with territorial restrictions.

Mr. Bangert. Why?

Mr. Alden. Because efficient distribution calls for elimination of a lot of costly and anemic participants that are in it now—many of these small bottlers. And I feel that the concentrate houses recognize this and are merely biding their time, and fighting time, to position themselves in structure and posture to do the job without a lot of these little bottlers.

And I think passing legislation to maintain territorial restrictions is a time factor working to the total interest of concentrate houses.

Mr. Chumbris. If counsel will yield, this business has been operating for over 75 years with the exclusive territories protected, and chain stores have been with us since, at least, 50 years, because the Robinson-Patman Act was passed in 1936. That was to have slowed down the chainstore movement.

Fast distribution sources have been available in this country, at least since the 1925's and 1930's, and in view of that history, we have Mr. Smith tell us that he had 1.035 bottlers in 1961, and in 1971 there are still over 800; and of the 200 dropped, at least a hundred of them were people who owned two franchises and combined them into one.

So what you say will come to pass with or without a bill, observing what has been evident in the last 50 years, this sudden absorption of the number of franchises—5,200 franchises to the 2,300 franchises—if it would have happened, it would have happened during the last 50 years when there was an exclusive territory to protect these bottlers, and not only in the white areas on the map that we are talking about, but I would assume in some of the other areas, also.

So I do not see how you can make that flat statement, that one way or the other, the franchises are going to go into the hands of a few

people, because for 50 years it has not done so.

Mr. Alden. Well, sir. I made the flat statement, not reconciling 50 years of growth and progress in this industry, but in terms of actual happenings in the industry in the past 5 years.

In southern California, there were a number of small plants on franchise X, let's say, because I do not care to get into brand names. I knew the man who started with the larger plant in that whole area.

Today, that whole area is operated by the one company started by that man—one basic corporate structure serving the entire southern California market—now owned by one of America's largest corporations. All the other little bottlers were absorbed or driven out. Even with territory regulations. Because most chain and warehouses were located in the one territory.

The California market is the size of the Canadian market. And in the California market, there are only a handful of soft drink producers

and marketers who control most of the business.

Mr. Chumbris. Mr. McDonald explained his procedure and how he took over the different franchises, and the reasons for them in the Los Angeles area. For example, in Las Vegas, there was a death in the family that led to a merger, and some of the members of the family are still connected with the merged company.

And that is why Mr. Smith said that out of the 100 reductions of the 1,035, there were causes where people blended their franchises together for the reason they thought they could do a better job.

If the other syrup people can do as well as Coca Cola has, as Smith has testified, and in 10 years, during an era of probably as great a merger movement as we have probably ever had in our history of mergers, to lose only 100 of 1,035, while in other industries only one-third, or one-half, of the companies remain in that particular industry, the soft drink companies have fared well in not losing more than about

10 percent.

But what we are talking about in this bill is to give legislative relief to protect the smaller bottlers in that wide-open area there—the white area you see on the map—from being absorbed by the big areas in Los Angeles, New York, Chicago, wherever the case may be. As the previous witness said, he can go into Denver and into Las Vegas and ship into Los Angeles. He has even talked about going into St. Louis and, possibly, Chicago and ship the soft drinks in.

And, in the meantime, all of those little fellows will be forced to

lose whatever business that they have.

And if you can show this record that these little fellows that you are talking about, cannot make a profit then do it, but they have been successful in business for a long time. As the witnesses have testified, they have passed their businesses on from father to son, to grandson.

Now, for them to pass that business on, the first generation may take over his father's business, maybe on sentimental reasons, but I don't think a second generation will do it for that reason alone. He must

earn a sufficient living for himself and his family.

Mr. Alden. Well, sir; that was a rather multiple question for me to

answer, but I will try to cover some of these points.

For one, I have been looking at these maps and I am quite intrigued. Those maps, apparently—the legend there says Coca Cola largest bottlers.

I have traveled this whole country. I have been in all these marketplaces. That is where your population is, and where population is, that is where your prime supermarkets are.

So, we are looking at a map there that involves people and distribution availability, and it would be only logical that the big com-

panies would be in those saturation points.

Mr. Chumbris. But I do not think the people of the United States are going to come to the point where they believe that New York, Chicago, Los Angeles, San Francisco, St. Louis, Baltimore, Boston, and New Orleans are going to be the only places in the United States that are important for us to take into consideration.

The bulk of the people of this country live in those white areas that we are talking about, maybe not in as great numbers in each city.

But that is what we are talking about in this bill.

Mr. Alden. Well, sir, let us take that white area known as the Rocky

Mountain States, which is all pretty white, as I see.

We have about 400,000 people, I believe, in Wyoming—whatever the Senator's figure was, I have not looked at it lately—in Colorado we have got about 4 million, and then when we laminate Utah and Idaho and New Mexico, throw everything together—all those nice white spaces—we have got a population that is not as great as Metropolitan New York.

Mr. Chumbris. I made that statement the other day. I used to live

in New Mexico, so I know the area very well.

Mr. Alden. Well, we are in agreement on that.

Now, that means that many of the bottlers, like bottlers in Wyoming, just do not have enough population to support an efficient plant, get

product out at favorable and competitive cost.

You have referred to one company that has had four generations of owners. I happen to know some of the third, some of the fourth and some of the second generation. They are very fine people. They have been very successful and made money.

However, I do not think that many of the third and fourth generation could stay alive without the safeguard umbrella on top of them—the restricted territory. Some of these people are "milking" the

business . . . not "building" it.

I do not see why any segment of industry—I say this as a taxpayer—should be protected to stay in business to pick up "unearned" increment when there are a lot of people fighting like hell to make "earned" increment.

The soft drink business, to me, is no different than the soap business, the cigarette business, the beer business, the liquor business, in fundamentals.

Someone makes a product and if there is a marketplace for it, and they can sell it profitably, they stay in business. If they cannot, they should not be in business.

Mr. Chumbris. There is a difference in some of the products you

mentioned, though.

Mr. Alden. Well, they are consumer package goods, sir.

Mr. Chumbris. Well, you talk about soap, that is not a franchise industry.

Mr. Alden. I am making a point. None of them are.

Mr. Chumbris. Beer is franchised. You mentioned liquor, liquor stores are franchised. You have to get a license to take over a liquor store. The soft drink is franchised.

So, you have to make a distinction between an industry that is franchised and has been built under that franchise, and an industry like you are talking about—soaps and other things— where they are sold on the open market.

Competition is fantastic because we have legislative bills on those particular subject matters, because they feel that there is too much

cut-throat competition and they cannot make a living.

We have bills on those points, too. So, let us stick to franchise industries.

Mr. Alden. Well, I would like to make one statement on liquor stores being franchised. They are not franchised. They are licensed to do business. It is entirely different than franchise.

When they are licensed, they are approved legally to operate. So

long as they respect the law, they operate.

The soft drink bottler has to please his concentrate house, with the whims of a concentrate house, if it becomes unhappy, the concentrate house can make the soft drink bottler pretty miserable with harrassment because of the "restricted territory" club.

This is giving succor to what I do not think is free enterprise.

Getting back to those wide open spaces, we are selling in Cheyenne, we are selling in Laramie, we are selling in Casper, and if people want our product, we get repeat business. If they do not buy our

product, we go out of business on those items.

The bottlers in that area have had problems. There is a little operation, a canning operation, up in a place called "Worland." He does a fantastic job. I think the population of the area is 500 people. He is a good free enterprise businessman. He will get along with or without restrictions, because he knows how to make product and he knows how to deliver it—profitably.

He will probably develop a bigger business if there are no territory

restrictions.

But bottlers who have been protected by restrictions are still folding. Now, you referred to a gentleman who said they had a thousand franchise bottlers some years ago, and now 800. They have one of the soundest structures in the business.

But it is fallacious, I think, to draw a conclusion that this is the guts of the problem, because the records show that, in the last 20 years, the total bottlers in this country have dropped from about 7,000—

6,800 give to take a couple of hundred—to about, I heard this morning, 2,300—the figure I had from my research was 2,700.

Mr. Chumbris. It is 5,200 to 2,300 from 1947 to date.

Mr. Alden. The figure I had was 7,000 down to 2,700, but it is still in the same ball park, roughly. But there has been quite a decimation of more than 50 percent of the total bottlers; that is with territorial restrictions.

And, as I said earlier this morning-

Mr. Chumbris. You are going into a different era, I think. We discussed that yesterday, that many independent bottlers in soft drinks that were here in the 1930's, 1940's, and early 1950's have either been absorbed or they have gone out of business. Perhaps we can get some

testimony on that point.

But I am taking the 10-year period, as to one bottler and Pepsi Cola, if they want to furnish their figures, they may, and 7-Up and the other three or four syrup companies that are mentioned as the seven or eight largest in the country. I think we have got charts for each one of them around the walls here.

But I do not want to belabor the point with you. You are an expert

in this field and I am not.

Mr. Alden. No, sir; I am a specialist, not an expert.

Mr. Chumbris. That is what I am saying, are you a specialist?

Mr. Alden. A specialist.

Mr. Chumbris. Who is the most competent, the expert or the

specialist?

Mr. Alden. My own definition, 20 years ago, of an expert was a damn fool away from home, and a specialist was a man who did his homework.

Mr. Chumbris. I have heard that.

As I say, I do not want to debate this further with you, but I wanted to get into the record that these 36 Senators who have put their names on this bill, and are concerned about the problems affecting their States, and I am sure that when the hearings are over and the matter is debated in executive session in the subcommittee and the full committee, many of these factors will be discussed.

And as I told a previous witness, the Antitrust Division has a responsibility and the FTC has a responsibility with the national

policy on antitrust.

The Congress has a different responsibility. Congress passed the Agnes bill to protect the people who lost their life savings in the

flood. Congress did not have to pass the law.

Congress did not have to pass the law to give \$100,000 to a singer who went to Europe for a performance and was injured, and the insurance had a limit of, maybe, \$15,000 or \$20,000, which was not sufficient for her expenses. Congress passed a special bill to take care of that woman's expenses.

That is why Congress has a different responsibility.

And when they listen to what all of these bottlers from all over the United States are going to say, they are not going to be as technical as you and some of the witnesses are as to how this business should be operated, or whether it should be open competition like the soap industry is, or whether there should be a different criteria when we have franchises, or criterias of competition, depending upon the nature of the business and how it grew up in this country.

Now, I do not think that Congress is ready—although they do make some changes on things—to restructure each industry just because it can be a little more efficient. There is still some humaneness in the discussions that we have here, and not just out-and-out efficiency.

Like the lowest possible price to the consumer, if that was the criteria, then we should not have any restrictions. We should let the cheapest labor come in. We should not have any restrictions on imports; let all the cheap goods come in from all over the world. We should do all of those things so we can get the lowest possible price.

But Congress is not going to approve such restructuring.

And I will say that once and I will say it again, because we have it in this area, we have had it in oil import quota hearings, we have had it in meat quota hearings, and right on down the line.

Mr. Alden. Well, I take what you say with a great deal of interest. On the other hand, getting back to the soft drink business, the

facts----

Mr. Chumbris. I hope we are still talking about the soft drink business.

Mr. Alden. Yes, sir. The facts are very simple.

There are a handful of major concentrate houses. There are a handful of minor concentrate houses. We cannot get away from the fact that with the decimation of all of these thousands of bottlers in the past two decades, that what is left is less than what was already decimated.

And there are mathematicians that make projections, and if you listen to some of them, you know, they can tell you exactly when

there will be no bottlers left.

As I pointed out this morning, it is a matter of record that onethird of the business is done by 40 bottling plants, that over 50 percent is done by 40 bottling plants and concentrate-owned plants.

This, to me, is highly significant to the interest of the small busi-

ness man, to the interest of the independent business man.

Without territory restrictions—you stated somebody testified that he could sell in St. Louis—he could sell from Los Angeles to St. Louis—

Mr. Chumbris. The previous witness. You were here when he

testified this morning. He is from Los Angeles.

Mr. Alden. I thought you were referring to a gentleman, yesterday. Mr. Chumbris. No. I am referring to a gentleman, this morning.

Mr. Alden. Well, this gentleman had a different concept. He is not in the soft drink business per se. He is not a franchise bottler.

I though you were referring to a franchise bottler.

The whole thing gets down to the economics and the preservation of the American way of life. If a small segment of industry can get special interest legislation, I as a taxpayer, become worried. I, as a businessman, become worried. Because I feel that our legislation should serve all of the people in the best interest.

And when we talk about a half dozen concentrate houses, and a few of the corporations that are listed in the top 50, and an extra few that are in the top 100 corporations in America, then I really do not

understand it, because I have been living with the laws, the needs to adhere to what the FTC is supposed to implement, and I do not see

why it should not be played across the board.

If I have a piece of packaging that is in error, I should correct that. If I have a food product or a drug product the FDA says is out of line with certain specs, I should correct that, and as a man in the soft drink business, I see no reason why the FTC should not still continue to implement the laws of the land as they exist.

And I believe that principle of no territory restrictions for soft drink

producers is correct.

Mr. Chumbris. Senator Hruska, in another hearing where there is a bill for the exemption from the antitrust laws, said that if we had no exemptions at all to the antitrust laws, he would agree with the witness that maybe they ought to think twice about granting an exemption.

But there are at least 10 major areas in which there are exemptions from the antitrust laws now, and there are about five or six other areas where there are not complete exemptions from the antitrust laws, but there are other criteria, such as the Congress has laws affecting the airlines and the railroads and so forth, where they have certain exemptions.

So, on that basis, there are already on the books certain exemptions. Now, the question comes up whether this particular problem also warrants an exemption. This is not the first time we are granting an

exemption from the antitrust laws.

I think we carried this colloquy along a little too far. I see the chairman may wish to get into the discussion, since I am dominating the time. We don't get as much time as the majority, but when I get a good point like this, I hate to let it go.

Mr. Alden. I am sorry I have not had a chance to give you a

rebuttal.

Mr. Bangert. How large is your organization, Mr. Alden, in terms

of cases per year that you produce?

Mr. Alden. Well, now, we are in an approximate area of half a million cases.

Senator HART. How many?

Mr. Alden. Half a million-500,000, sir.

Mr. Bangert. Now, can you dispose of all of that product within your exclusive territory?

Mr. Alder. Everything that we have sold, we have sold right within

the 10 counties, on one franchise.

Another franchise we have is in the entire Rocky Mountain States, and we have disposed of that product within the entire Rocky Mountain States.

Then we have some brands that we have developed, that we are

marketing and seeking to market from coast to coast.

Mr. Bangert. But part of your product, as I understand, is sold to warehouses within your territory, and the warehouses in turn ship outside of your territory. Is that right?

Mr. Alden. All of our sales in the Royal Crown Bottling Co. are invoiced and are made to warehouses within our franchise—so-called

franchised area. That is correct, sir.

And the rest of them, when they find their way to other warehouses are sold to the local distributor.

Mr. Bangert. Now, do you have any idea, and I do not know whether you do, how much of your product is sold in warehouses that eventually goes outside of your territory?

Mr. Alden. Your question is really a multiple-question, without

your realizing it.

First of all, the reason why we are selling the high percentage of product that we are selling to warehouses is because of the type of packaging—convenience packaging.

If we marketed totally in returnable bottles, we would not be going

very far. We have convenience packaging.

We sell one chain division that does business in Nebraska, Kansas, Wyoming, New Mexico, and all of Colorado. We sell and ship into their warehouse in Denver and they, as owner of the goods, have a perfect right to do what they want with it.

Now, we know that it is being distributed wherever they want to, but we have no asurances when we make the sale that all of it may

not end up in stores right in Metro Denver.

It is their discretion whether they want to ship it division wide, cut out Wyoming, or ship it up to Scottsbluff, Nebr., or ship it just down to Colorado Springs.

This is not our business. Our only interest in the business is that

we get repeat sales.

We have spent a lot of money on advertising. Having been in the advertising business we think that we know that it is a pretty good eco-

nomic tool, up to a point.

But it is a little frustrating when you try to follow the distribution channels, which spill over on territorially restricted counties and States, when you use media advertising. Other bottlers get the benefit of our media advertising on television and radio—these bottlers contribute nothing to our advertising budget. We are putting up the cash. We are helping to build these licensed trademarks. But territory restrictions forbid our sales follow-through to cash in on our advertising circulation.

We have asked the concentrate house to make advertising contributions because of the big chunk of money we were spending that was go-

ing outside of our restricted territory.

We have some powerful stations in Denver that go into Wyoming and Montana and Idaho. The concentrate house refuses us such help. But we do know that they provide moneys for cooperative advertising to other bottlers, many of them larger, nevertheless, we felt that we are entitled to our share, and do not get it.

So, you see, with restricted territories it is a one-side street.

A concentrate house can play it to their best interest, as they wish. Their only interest in me is how much concentrate, how much additional juice I can sell in a restricted territory, and the rest is all window dressing.

I have tried to answer your question with these comments.

Mr. BANGERT. I assume that there is product coming into your territory from outside, also. In other words, I assume that some bottler, some place, is selling to a warehouse and that warehouse ships into your territory. Is that right?

Mr. Alden. Well, again, your marketing areas and your warehouses parallel. So Denver, being a harbor of the Rocky Mountain States, has

some key warehouses.

The next big point for warehouses would be Albuquerque, N. Mex., to the south. The contiguous key point for warehouses, going north—there is nothing in Wyoming, except Casper, a little wholesale house owned by a Salt Lake City operation. And then in Boise there are two big wholesale houses, and in Salt Lake City there are two big ones and a couple of chains, and also in Boise there is headquarters for Albertson, one of the major chains in the country.

This accentuates the fact that good business dictum is to follow the marketplace on your distribution pattern, and to have the facilities to

take care of it.

Now, it is quite possible that someone from Los Angeles may decide to ship products into our marketplace. As a marketing man, we evaluate all of the possibilities, and we feel comfortable in knowing exactly what we are going to do about it.

And this is not just conversation, because if we did not know what to do about it, it would be suicidal to feel the way we do about this

whole thing.

And we feel that in any prime market or secondary market, a good businessman can continue to get his share, because if one of the major companies—by major I mean large bottling companies, like Beatrice Food—came into the marketplace, there would be a place to live, because they could not possibly do the job except through warehouses.

Then, maybe, I have to become a distributor. Maybe I am the guy who has to end up taking care of bowling alleys. And if that is the

economic way of life, I have faced it.

But I do not feel that I need legal protection with legislation on

restricted territory, to do business in free enterprise.

Mr. Bangert. I guess the point, also, that you make is that the exclusive territories, as they are now drawn, are not necessarily in line with what the natural marketing area may be at this point.

Mr. Alden. Precisely. Precisely.

The franchise maps, as they have been set up, are archaic. After all, if a man has had a franchise for four generations, you know there has been a lot of change.

I remember the day when southern California did not have a very heavy population. And after World War II it became quite a mecca

and quite an important marketing area.

So the franchisee there, just sat there and became very important.

I remember the first Pepsi-Cola bottler went broke there.

Now, I recall a major property worth 16 million that I was offered for a half a million. I said I did not want to be a bottler then. My wife and I kid about that.

Time change. Marketing strategies change. Advertising techniques change. Getting product into the marketplace and to the consumer is

an ever-changing situation. It is not static.

So what was good and what was right 70 years ago, may have still been good and right 50 years ago, or 30, but not necessarily 20 years

ago, 10 years ago, or today, or for tomorrow.

And I am thinking of today and tomorrow on territorial restrictions, and I say that they do not belong. I say that we now have legislation, we have had Supreme Court decisions, and we have an important arm of the Government that is empowered with the biggest budget it has ever had to follow through on these things; and I, as a taxpayer and citizen query, "Why aren't they?"

Mr. Bangert. Just a couple of areas I would like to cover with you. We have heard that interbrand competition is such that there is no need, really, for intrabrand competition. And I wonder if you would have any ideas on that.

Mr. Alden. Intrabrand? I like to speak of this from a marketing standpoint, of basic principles rather than soft drink business, and

then come in with a clincher on soft drinks.

All products have actual intrabrand competition. Let us take Los Angeles, which I consider the most complex and biggest food market-

ing area in the country, or in the world.

We have a Certified Grocer, which is known as the largest retail co-op in America, although there is one in New York that also makes the claim. Certified is at least the second largest. And we have A. M. Lewis. Both handle a lot of similar products and brands but their pricing in their price books will vary on the same product and brand.

And a retailer can buy where he wants to. He may belong to Certified and decide to pull some items out of  $\Lambda$ . M. Lewis. So, he can get his cost at best, and in so doing he is either making an extra profit or he is

passing lower cost on to the consumer.

The food chains are not in very good shape in southern California. They are fighting hard to make a dollar, and they are very competitive on pricing. So they are not looting the consumer. If they can buy an item at a more favorable price, they will do so and will sell it at a more favorable price.

Now, that is intrabrand competition on nonfoods, dry groceries,

drug items, or specialty foods.

Getting back to the soft drink business, it is impossible for me with the years I have spent in marketing to even think of intrabrand competition on soft drinks. There has never been such an animal, really. It has always been an interbrand, not intrabrand battle.

So when I first heard that expression, I was a little puzzled. There

is no such thing, but I see it as being quite feasible.

There is no product in America that should not have multipledistributor distribution, in my opinion. Monopolistic distribution does not benefit anyone but the one guy that has the monopoly. And the story of our business success in the distribution of food products has indicated that almost everything in America has intercompetition and

intracompetition.

The great whiskey houses have multiple distributors in many markets. They used to have single distributors and found out they could make more money with multiple. So they switched the deal, creating intrabrand competition where retailers want to buy whiskey X, the price book of one distributor might not be as favorable as another's, so the retailer can buy from the distributor where the price on whiskey X is most favorable. The retailer can shop around, and there is intrabrand competition. Intrabrand competition is very healthy in the marketplace. It keeps everybody on their toes and it shakes out the weak sisters, and the fewer weak sisters you have, the stronger your competition and the healthier your competition is.

A bunch of weak competitors are more dangerous than a bunch of strong competitors. The soft drink industry lacks intrabrand com-

petition. It is stifled by territory restrictions.

Does that answer your question, sir?

Mr. Bangert. Yes; it sure does.

I have no further questions, Mr. Chairman.

Senator Hart. Mr. Chumbris?

Mr. Chumbris. I would not dare take up any more time after that long coloquy I had with the witness. I have covered most of my points.

Thank you for coming. Senator Hart. Mr. Kern? Mr. Kern. I have no questions. Senator Hart. Dr. Anderson? Dr. Anderson. No, thank you.

Senator HART. We have had you a long time and you have been very helpful. Thank you very much.

Mr. Alden. Thank you.

Senator Hart. Our next witness is Dr. Lee Preston of the School of Management, State University of New York at Buffalo, appearing here for the National Soft Drink Association.

We welcome you back on behalf of the committee.

# STATEMENT OF DR. LEE E. PRESTON, SCHOOL OF MANAGEMENT, STATE UNIVERSITY OF NEW YORK AT BUFFALO, APPEARING FOR THE NATIONAL SOFT DRINK ASSOCIATION

Dr. Preston. I am very glad to be here.

I have submitted a rather extensive statement, and I would like to file it for the record, if I may. I will speak only briefly from the statement and a few notes, leaving as much time as possible for questions and discussion of the matters of greatest interest.

Senator HART. The statement and this material will be printed in the

record.

(The documents follow. Testimony resumes on p. 425.)

#### STATEMENT OF DR. LEE E. PRESTON

#### QUALIFICATIONS

I am a member of the faculty of the School of Management. State University of New York at Buffalo, where I hold the title Melvin H. Baker Professor of American Enterprise. I have occupied this position since September 1969. Prior to that time, I was for 11 years a member of the faculty of the School of Business Administration, University of California, Berkeley. At the time of my resignation from the Berkeley faculty, I was Professor and Associate Dean of the Schools of Business Administration. I hold an A.B. degree in economics from Vanderbilt University and A.M. and Ph. D. degrees in economics from Harvard. My teaching and research areas have been economics and marketing, and my special fields are usually described as "industrial organization" and "marketing organization." I am the author of more than 40 publications—hooks, monographs, and articles—dealing with these and related topics. (A complete biographical statement is attached as Appendix A.)

This is my third appearance before the Subcommittee on Atitrust and Monopoly. I have also presented testimony before the Senate Select Committee on Small Business and the Joint Economic Committee. On all of these occasions, I have appeared as an independent academic witness at the invitation of the committees themselves. I have served in the past as a consultant to the Federal Trade Commission; and I was a member of the White House Task Force on Antitrust Policy (Neal Committee) during the Johnson Administration. I served as a staff economist for the Council of Economic Advisors during the Kennedy Administration; and I am currently an active consultant to the Antitrust Division of the U.S. Department of Justice and also to the Department of

Justice of the State of California. I am also a consultant to the Seven-Up Company and, from time to time, to various other private firms and law firms. I appear here today at the request of the National Soft Drink Association.

#### EFFECTS OF VERTICAL TERRITORIAL ARRANGEMENTS

The broad subject of these hearings, as I understand it, is the legal and economic implications of the territorial franchise system between national franchisors and their local franchisees in individual market areas. The essence of such arrangements is that the franchisee is limited with respect to the geographical area within which he can offer for sale the products or services for which he is licensed by the franchisor. My own particular interest in this subject arose from an invitation from Professor Clark C. Havighurst, editor of the journal Law and Contemporary Problems, published by the Duke University Law School, to prepare a paper for a special issue of that journal dealing with The Antitrust Laws and Single Firm Conduct (Volume XXX, No. 3, Summer 1965). A copy of that paper, "Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards," is attached as Appendix B to this testimony.

The paper presents a simple analytical model for appraising the economic effects of customer or territorial restrictions placed on distributors (i.e., franchisees) by suppliers. The general conclusion is that the purpose and effect of such restrictions is to increase the number of franchisees of any particular type or for any particular supplier over the number that would otherwise exist. According to my analysis, suppliers use such arrangements in order to expand total demand for their products and services by obtaining the best possible geographic coverage of the total market, given the structure of distribution costs and basic

demand factors.

The article proposed the following two-part criterion for antitrust policy in this area:

Restrictive arrangements imposed upon distributors individually by a supplier are permissible when—

1. they make possible, with no direct reduction in the availability of products of other suppliers, a level of market coverage for the supplier's product substantially greater than could be attained with overlapping distributorships, and 2, they do not result in distributorship or supplier profits substantially different profits.

ferent from "normal" levels for the risk, skill, and capital involved.

The first part of this test examines the impact of the arrangement on the availability of product and outlet alternatives in the final market and the importance of competitive costs. The second discriminates between the permissible cases and those involving horizontal collusion among distributors, coercion of captive distributors by suppliers, and vertical restrictions supporting a supply monopoly. The key word in the second part of the test is result; it is not enough that restrictive practices may occur in a context of abnormal profits—there must be some cause-effect relationship between the two. (p. 519)

Since the publication of this article, I have continued to follow the academic

literature and legal developments in this area with some care.

#### SOFT DRINK INDUSTRY

My purpose here today is to outline for the Committee my basic understanding of the role of the territorial franchise system in the soft drink bottling industry and the effects that would follow from the elimination of this system as a result

of court decisions or public policy actions.

The initial point that I would like to emphasize about the soft drink industry is its great diversity, both with respect to its internal dimensions and with respect to its interconnection with other activities—food and beverage consumption in general, recreation and entertainment. Soft drinks are one of the most rapidly growing industries within the food and beverage group. One factor in this growth is the strong relationship—both substitution and complementarity—between soft drinks and other food and beverage products. Another factor is the close connection between soft drink consumption and leisure time activities.

The principal aspects of internal diversity within the soft drink industry—aspects that must be taken into account in an analysis of its economic structure and operation—are listed in Exhibit I. This exhibit is constructed in order to suggest, to the extent possible, not only the major dimensions of the industry

but also their relative importance and the interconnections among them. The percentage figures are estimates based on the total final volume of soft drink sales, except as otherwise noted, and are rounded to indicate approximate levels for 1970–71. There appears to be no single reliable source of comprehensive statistical data for this industry.

The principal sources of soft drinks in the United States are the major national franchisors and their franchised bottlers, the supermarket chains with their store-controlled labels, and other—but by no means unimportant—franchisors and local and regional manufacturers. Store-controlled brands of soft drinks are of relatively recent origin, but have accounted for increasing percentages of the total

final soft drink market in recent years.

Marketing arrangements and distribution costs differ significantly between soft drink products in final packaged form (bottles and cans) and bulk products for fountain or cup machine vending. Soft drinks sold in packaged form account for more than 80% of total volume. There are also substantial cost and demand differences among products related to package size (which varies from 6½ to 48 ounces), and the form and returnability of containers. Further differences arise related to on-premise or off-premise consumption of soft drinks.

One of the most striking features of the soft drink industry is the variety of types and flavors of drinks available. This variety accounts for the broad substitutability between soft drink products and most, if not all, other beverages—from mealtime drinks such as coffee, tea, and water, on one hand, to "mixers" such as quinine water and club soda, on the other. The most conspicuous trend with respect to product variety has been the declining share of the total soft drink

market accounted for by cola-flavored drinks.

With respect to the characteristics of bottlers, a distinction should be drawn between those bottling organizations owned and operated by the franchise companies themselves and the franchised bottlers who account for the great bulk of total activity in the industry. Within the franchised segment of the industry a further distinction may be drawn between small bottlers operating one or a few plants, large bottling organizations with multiple plants, and bottling organizations owned by other large diversified firms. Each of these may have somewhat different economic characteristics and may respond to competitive developments in different ways. It is also important to distinguish between bottlers who handle the products of only one franchisor and other bottlers who handle brands from multiple sources or their own independent brands along with their franchised brands. The territories served by bottlers also vary considerably—in geographic size, population and sales potential, etc. The territory of a local bottler of Brand A may overlap the territories of more than one bottler of competitive Brand B; and the bottler of Brand A may also be franchised for Brand C with different territorial limits, either confined within or extending beyond his Brand A territory.

Soft drinks reach the final retail market through a great variety of types of outlets. Within this variety, chain supermarkets account for the single largest portion of final sales. This prominent market position is, of course, both a cause and an effect of the expansion of supermarkets in the production or the pro-

curement of controlled label soft drink products for retail sale.

Prices of soft drink products, on a per ounce of beverage basis, vary considerably among brands, containers, and package sizes. If the price per ounce of major brand drinks in large (16 ounce) returnable containers is used as a basis for comparison, inspection of data for a number of individual metropolitan markets suggests the following relative price comparisons:

Major brands in returnable small (6½ ounces) containers—more expensive

by 50% to 100%.

Major brands in nonreturnable containers—more expensive by 10% to 50%. Store-controlled and other brands (largely nonreturnable)—from 20% less to

20% more expensive.

Price structures in individual markets vary, of course, in response to local market conditions and special promotions by merchandisers at every level of the marketing system. Actual unit prices in dollars and cents also vary on a geographic basis and over time. The point is that in any particular retail market area there is at all times a wide variety of soft drinks available—differentiated by brand, flavor, package size, container, and price.

#### EFFECT OF ELIMINATING THE TERRITORIAL SYSTEM

We now come to the critical issue: within this diverse array of product features and competitive forces, what is the effect of the current territorial franchise system, and what would be the effect of its elimination? In the interest of brevity, let me list the developments that seem most likely if the present system should be abolished by court decision or public policy action.

1. Some realignment will occur in the geographic market areas served by bottlers at some specific locations. (If this does *not* happen, then there is no

effect whatsoever.)

2. Some firms will gain sales at the expense of others, thus increasing in size. If this happens to any substantial extent, some firms will go out of business. Since some of the largest bottlers are certain to grow, there will be some tendency for concentration in bottling to increase on both a nationwide and a

regional basis.

3. The number of different bottlers serving any specific local market area will probably be the same or smaller than it was before. Initially, of course, if one bottler expands into another's area both will be engaged in activity there. However, it is unlikely that both will be able to incur the transportation and other marketing costs necessary to provide duplicate service to the same geographic area. Hence, the firm that succeeds in capturing the larger accounts will most likely drive the other from the territory. There will probably also be a decline in the number of brands available in any specific local market because

of the elimination of minor brands.

4. The other important structural effects of eliminating the territorial franchise system will involve vertical market relationships—that is, the relationships between franchisors and bottlers, and between bottlers and retailers. Arrangements between franchisors and franchisees are not chance phenomena; they exist for economic purposes. The particular arrangements under consideration here exist because they have permitted the franchisors to increase the total market demand for their products by stimulating their individual franchisees to develop the market potential within their territorial areas as effectively as possible. The franchisees gain from local promotional activity and complete service of their territories; the presence of their brands in small-volume outlets serves as an advertising device and as a stimulus of demand in large-volume outlets. In order for this motivational mechanism to work, the local bottler must in fact obtain the benefit of any sales expansion in the large-volume outlets. The franchise company gains, of course, both from the small-outlet sales directly and from the additional total market stimulation brought about by widespread product availability. I cannot find anything individually discriminatory or socially harmful in this arrangement.

If the present franchise method of obtaining this particular pattern of market coverage and service is eliminated by public policy action, then I believe the franchise companies themselves will be strongly motivated to increase their own ownership and operation of local bottling and distribution activities. Their ability to do this will be facilitated by the increasing popularity of nonreturnable containers, particularly cans, which permit relatively economical long-distance shipment. Of course, the larger the franchise company and the greater its market share in individual markets, the more economical direct integration into bottling

and distribution will be.

A comparable change in vertical market relationships may also occur through expanded backward integration of supermarket chains into soft drink bottling. Chains may purchase isolated, small franchised bottlers and use them as the base for supplying large regional retail networks. Any such move will, of course, eliminate all these large accounts from the markets served by surviving local bottlers.

It seems obvious to me that strong pressures for vertical integration exist in this industry from both the franchisor and the retail ends of the marketing channel. Any increase in bottler concentration and in the bargaining power of individual large bottlers vis-a-vis either the franchisors or the retailers will intensify, not offset, these integration pressures.

5. With respect to prices, any particular effects associated with the elimination of territorial restrictions are very difficult to forecast. I assume, of course, that the expansion of geographic market areas by *some* large bottler organiza-

tions will involve some reduction in wholesale prices to some retailers-at least in the short run. How great and how widespread such reductions will be, and how long they will persist over time as bottler concentration increases, are, however, very different matters. I see no basis for anticipating the frequency,

amount, extent, or duration of any such price reductions.

Equally important is the fact that the net impact of wholesale price changes on retail prices is very difficult to anticipate. There is already a very wide array of retail soft drink prices, both in dollars and cents per unit and on a price-perounce basis. For any wholesale price reduction to lead to a retail price reduction, two conditions must hold: (a) The wholesale reduction must be large enough to permit a visible retail reduction on a per-package basis, and (b) The possible retail reduction must also be attractive from the merchandising viewpoint of the retailer. Since the focus of any anticipated wholesale price reduction must be on nonreturnable containers, the question to be raised is this: What would motivate a major food retailer to reduce the price of major brand nonreturnable soft drinks on his shelves in direct competition with his own controlled-brand merchandise? My own investigations of retail food marketing clearly document the fact that margins vary widely among items and products within the food stores, and are usually higher (on a percentage basis) on controlled-label merchandise. The optimal pricing policy for the food retailer is to develop a mix of products, prices, and margins such that his total volume and profit are maximized. I find it hard to believe that lower regular prices for major brand soft drinks will prove to be a part of the optimal price mix in chain supermarkets, most of which are currently enjoying growing sales of their own-label products.

#### CONCLUSIONS

The conclusions of my analysis can be briefly stated. I find the territorial franchise system in the soft drink industry to be an economically reasonable form of market organization. It increases both the total number of bottlers operating in the economy and the number of brands available in local markets (because of the addition of new or minor brands to the major lines of individual bottlers), and hence generates both actual and potential competitive forces within local soft drink markets. I have seen no evidence to indicate that bottlers as a whole are enjoying exorbitant profits as a result of these franchise arrangements. It seems clear that elimination of the territorial franchise system would

result in greater concentration at every level of activity in the industry—at the brand level because of the elimination of minor brands, at the bottler level because of the growth of large bottlers, and at the retail level because of the buying power of the chain supermarkets. Along with this increased concentration would come increased vertical integration, both backward from the retail level and forward from the franchisor level. And all of these developments involve, of course, the expansion of the share of all soft drinks marketed in nonreturnable containers. (If there is any thought of public policy action to stimulate a return to returnables, this would appear to be a step in the opposite direction!)

Under these circumstances, any substantial decrease in consumer prices of soft drinks seems extremely unlikely. (Indeed, even if the supermarket price or major brand nonreturnables declined somewhat, the resulting shift in demand away from returnables and minor brands might well raise rather than lower the average price-per-ounce actually paid by consumers!) But even if some specific groups of buyers would have to be balanced against the loss of product variety, increased entry barriers, increased concentartion, and elimination of

business opportunities associated with the entire pattern of change.

I am entirely convinced that territorial franchise systems, operating alone and not as a part of more comlex market-control or price-fixing schemes, do not in general constitute harmful or anti-competitive forms of marketing organization in whose sectors of the economy in which they typically arise. On the contrary, as compared to more highly concentrated and vertically integrated alternatives, territorial franchises would appear to strengthen the competitive variety and flexibility of their industries. Of course, specific instances in which these, or any other, contractual arrangements do lead to generally undesirable economic effects should continue to be investigated and modify by public policy on a case-by-case basis.

#### EXHIBIT I

## SOFT DRINK INDUSTRY—DIMENSIONS OF ANALYSIS

1. Brands-companies:

a. Major national franchisors and their franchised bottlers (Top 8, with 1650 bottlers-78-80%).

- b. Retail store-controller labels (7-8%).
- c. Other (12-15%).
- 2. Final product form :
  - a. Bottles-case (various sizes; on- and off-premise consumption):
    - (1) Returnable bottle (40%).
    - (2) Nonreturnable bottle (14%).
    - (3) Can (27%). Total (81%).
  - b. Bulk (on-premise consumption):
    - (1) Fountain.
    - (2) Cup machine. Total, 19%.
- 3. Type of drink:
  - a. Cola (58%).
  - b. Lemon-lime (16%).
  - c. Root beer (7%).
  - d. Orange (6%).
  - e. All other (13%).
- 4. Bottler characteristics:
  - a. Type of organization.
    - (1) Franchise-company owned (3% of plants).
    - (2) Franchised:
      - (a) Small, specialized (93% of plants).
      - (b) Large, specialized (2% of plants).
      - (c) Subsidiary of large diversified firm (2% of plants).
  - b. Bottler product mix:
    - (1) Single-line (brands of a single franchisor) (45% of bottlers).
  - (2) Murtiple-line (brands of more than one franchisor or other source) (55% of bottlers).
- c. Bottler territory: Location; population and sales potential; overlap of territories for multiple-lines; overlap of territories with competitive brands.
- 5. Type of retail outlet: a. Chain supermarket (35%).
  - b. Other store for off-premise consumption (25%).
  - c. Eating and drinking establishment (15%).
  - d. Other (service stations, stands, vending machines, etc.) (25%).
- 6. Price (index, based on price-per-ounce of beverage, retail):
  - a. Major brand returnable:
    - (1) Large (100).
    - (2) Small (150-200).
  - b. Major brand nonreturnable (110-150).
  - c. store-controlled and other brand (largely nonreturnable) (80-120).

#### APPENDIX A

#### BIOGRAPHICAL STATEMENT OF DR. LEE E. PRESTON

Education: B.A.—Vanderbilt University, Nashville, Tennessee, 1951; M.A.— Harvard University, Cambridge, Massachusetts, 1953; Ph. D.—Harvard University, Cambridge, Massachusetts, 1958.

Membership in Societies: American Economic Association and American

Marketing Association.

Positions Held:

1969-present: Melvin H. Baker, Professor of American Enterprise and Chairman, Department of Environmental Analysis and Policy, School of Management, State University of New York at Buffalo.

1967-1969: Associate Dean, Schools of Business, Administration, Uni-

versity of California, Berkeley.

1967 (Spring): Visiting Professor, Lingman Institute of Business Ad-

ministration, Chinese University of Hong Kong, Hong Kong.

1966 (Winter): Visiting Professor, American University in Cairo, Egypt. 1966 (Spring): Research Economist, Center for Economic Research, Athens, Greece (on Leave).

1961-1962: Staff Economist, Council of Economic Advisors, Executive

Office of the President of the United States (on Leave).

1958-1969: Assistant (1958-62), Associate (1962-66), and Full Professor (1966-69) of Business Administration, University of California, Berkeley.

1952-1954 and 1956-1958: Teaching Fellow in Economics, Harvard University

Other Professional Appointments:

(1) Member, White House Task Force on Anti-Trust Policy (Neal Com-

mittee), 1967-1968.

(2) Consultant to U.S. Department of Justice; State of California; Scott, Foresman & Co., educational publishers; various private firms, law firms, and public bodies.

Publications

#### BOOKS AND MONOGRAPHS

Cases and Problems in Economics, with James S. Duesenberry, (New York: Prentice-Hall, Inc., 1960).

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#### APPENDIX "B"

# RESTRICTIVE DISTRIBUTION ARRANGEMENTS: ECONOMIC ANALYSIS AND PUBLIC POLICY STANDARDS

By
LEE E. PRESTON

Reprinted from the symposium on

# THE ANTITRUST LAWS AND SINGLE-FIRM CONDUCT

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# RESTRICTIVE DISTRIBUTION ARRANGEMENTS: ECONOMIC ANALYSIS AND PUBLIC POLICY STANDARDS

LEE E. PRESTON\*

Restrictive distribution arrangements result from agreements between suppliers and reseller-buyers of merchandise in which one of the parties or both of them accept limitations on the scope of managerial discretion with respect to certain marketing practices, such as the selection of sales territories, customers, products, or prices. Restrictive arrangements differ greatly in form and substance and in the particular marketing contexts in which they are applied. The purpose of this paper is to develop through economic analysis a framework for assessing the impact of such arrangements, particularly those having to do with customers and territories, on market competition. Within this framework, we then develop and illustrate a standard for identifying those restrictive arrangements that are compatible with a pro-competitive public policy.<sup>1</sup>

Restrictive distribution arrangements are intermediate forms of vertical market control, between the extremes of no control (independent dealings) and complete control (vertical integration). Neither the economic impact nor the public policy status of such arrangements has been fully articulated, and at the present time vertical marketing relationships of all sorts are undergoing economic, legal, and legislative scrutiny.<sup>2</sup> Vertical price agreements are, of course, currently regarded as illegal

I should like to acknowledge the substantial contributions of Professor R. M. Buxbaum, University of California Law School, and Edwin H. Epstein, Esq., School of Business Administration, to the development of the ideas in this paper and, particularly, to the location and interpretation of legal materials. Valuable comments have also been received from Dean E. T. Grether and Professors H. O. Stekler and L. P. Bucklin of the Berkeley faculty. Responsibility for interpretations and errors is, of course, my own.

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<sup>&</sup>lt;sup>1</sup> Most general works relating economic analysis to antitrust policy deal with these matters to some extent. Important examples reflecting current thinking include Joe S. Bain, Industrial Organization 327-31, 477-540, 563-78 (1959); Carl Kaysen & Donald F. Turner, Antitrust Policy 119-27, 142-60 (1959); and Joel B. Dirlam & A. E. Kahn, Fair Competition chs. 4, 6 (1954). Recent surveys of the legal issues are contained in Symposium—Antitrust Limits on Distribution Policies and Programs, 26 A.B.A. Antitrust Section 55-157 (1964); Symposium—Vertical Arrangements Under the Antitrust Laws, 22 id. 15-143 (1963); Jordan, Exclusive and Restricted Sales Areas Under the Antitrust Laws, 9 U.C.L.A.L. Rev. 111 (1962); Travers & Wright, Restricted Channels of Distribution Under the Sherman Act, 74 Harv. L. Rev. 795 (1962); and Stewart, Antitrust Considerations Involved in Product Distribution, 19 Bus. Law. 967 (1964).

<sup>&</sup>lt;sup>2</sup> In addition to the attention directed toward restrictive arrangements themselves, important issues are being raised with respect to mergers, other forms of vertical integration, and diversification of large companies. Cf. Hearings Before the House Select Comm. on Small Business on the Impact Upon Small Business of Dual Distribution and Related Vertical Integration, 88th Cong., 2d Sess. (1964); Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary on Economic Concentration, 88th Cong., 2d Sess., pt. I (1964); and Handler & Robinson, The Supreme Court vs. Corporate Mergers, Fortune, Jan. 1965, pp. 164-78.

restraints upon trade under section 1 of the Sherman Act, unless specifically protected by state law. Product restrictions (exclusive dealing and tying) are illegal under section 3 of the Clayton Act where they "substantially lessen competition or tend to create a monopoly . . . ." In 1948, the Department of Justice issued a policy statement setting forth the view that territorial and customer restrictions were illegal per se, and a number of informal contract modifications and consent judgments were subsequently obtained.3 However, several recent court proceedings indicate that this extension of per se doctrine has not been accepted by the judiciary.

# RESTRICTIVE ARRANGEMENTS AND COMPETITION

Any restrictive distribution arrangement transfers some of the decision-making authority of one business unit into the control of another. An initial distinction might be drawn between those formally restrictive agreements that do not, in fact, alter the behavior of the controlled unit (or that restrict behavior only with respect to peripheral activities, such as minimum stock levels, display requirements, and so forth), and those which do restrict behavior in some important respect. The former type of agreement (for example, one imposing a modest advertising requirement), which appears to be very common in our economy, may simply represent a codification of existing trade practices without any significant enforcement mechanism or sanctions. Such agreements are restrictive in form but not in substance and may be dismissed from further consideration.

Restrictive marketing arrangements may be adopted both singly and in combination to accomplish particular purposes. Taken individually, the principal types of restrictions and their effects may be summarized as follows:4

- 1. Customer-territorial restrictions limit distributors in their choice of customers or sales areas; they thus reduce the direct competition between distributors of the same line of products, although they may be used to extend market coverage to customers to whom the products would not otherwise be made available. The operation of this type of restrictive arrangement will be considered in detail below.
- 2. Resale price restrictions limit distributors in their choice of prices, and thus shift competitive efforts into services, location, merchandising technique, or the pricing of nonrestricted products. The impact of resale price maintenance schemes largely depends upon, rather than determines, the strength of interproduct competition; however, resale price restrictions may contribute to the stability of vertical price structures and may importantly affect the number and size of distribution outlets.
  - 3. Product restrictions either compel distributors to carry other of the supplier's

<sup>&</sup>lt;sup>8</sup> Travers & Wright, supra note 1, at 796-97.

<sup>\*</sup>Throughout this discussion we use the term supplier to refer to the firm on the selling side of the market and distributor to refer to the reseller-buyer. This choice of terminology emphasizes the fact that restrictive arrangements may arise at any vertical market level, e.g., between manufacturers and wholesalers, wholesalers and retailers, industrial distributors and jobbers, and so on.

products (tying) or prohibit them from carrying the products of others (exclusive dealing) as a condition of their being allowed to purchase certain items for resale. Product restrictions thus foreclose particular distributors as routes of market access for competitive products and, as a result, may weaken competition among distributors directly. They may also weaken competition among suppliers by limiting the market choices of distributors and final customers and by creating barriers to the appearance of new products in the market.

Restrictive marketing arrangements of any sort thus limit competition in some respect. However, as we shall illustrate in more detail below, limitations on competitive activity in one direction may strengthen competitive forces in another. The analysis of the over-all competitive impact of any particular pattern of marketing arrangements involves a large number of variables and rests upon a number of crucial distinctions. First, competitive structure, the presence of relatively large numbers of independent decision units on both sides of a market, must be distinguished from competitive behavior, the aggressive pursuit of market opportunities by each individual unit. Restrictive agreements are like mergers in that they can only represent a reduction in the total number of independent decisions to be taken in the market, ceteris paribus. The question for analysis in both cases, however, is whether this departure from competitive structure within one marketing organization is counterbalanced by an increase in the number of marketing organizations and products available in particular markets or in the vigor of competitive behavior.

A second distinction is to be made between interbrand and intrabrand competition. If all branded products were distributed directly by their manufacturers, we would not expect any intrabrand competition to develop in the market. However, when the products of many manufacturers are distributed through independent, and usually multiproduct, distribution outlets, the prices of individual products become elements in the over-all competitive strategy of these firms. Their "enterprise competition" involves the sale of complex assortments of goods and services and the attraction and retention of customer patronage over time. Thus, intrabrand competition arises because of differences in the cost and demand conditions facing various distributors and their differing responses to market opportunities. Restrictive arrangements with respect to any product limit, and may completely eliminate, the use of that product as a vehicle of enterprise competition among distributors. However, whether this has any perceptible effect on the vigor or character of competition over-all will depend upon many other factors. Among the most important of these are the presence of alternative brands (and the strength of interbrand competition) and the variety and importance of service, location, and other nonprice elements of competitive strategy.

A closely related matter is the interaction between horizontal and vertical market relationships. The present state of economic analysis does not, in general,

<sup>&</sup>lt;sup>5</sup> This term was coined by Dean E. T. Grether.

permit us to specify the impact of changes at one of several vertically related market levels upon structure and behavior at another. Even were a fairly detailed analysis possible, there is far from universal agreement as to the public policy criteria to be applied in choosing among several possible multi-market patterns of competitive forces. In general, there is some presumption that competitiveness in "final" markets is the primary public policy consideration, but this criterion is not fully satisfactory because (a) the identification of any one market as "final" becomes somewhat ambiguous with respect to products other than nondurable consumer goods and (b) some reduction in competition in final markets (e.g., limitation on intrabrand competition) may be associated with the maintenance or increase of competitive alternatives in intermediate markets.

Finally, there is a distinction to be drawn between the balance of competitive forces throughout a broad market and the strength or weakness of bargaining positions of particular buyers vis-à-vis particular sellers. For example, when either party to a transaction has come to rely upon the other for more than the normal provision of merchandise and service available elsewhere in the market, the dependent party's bargaining position becomes weakened, and the dominant party may attain a power of coercion over this particular trading partner in no way paralleled in its dealings with other enterprises. The illegality of contractually exercised coercive power, quite apart from any association with market-wide monopoly, has been recently affirmed in Lessig v. Tidewater Oil Co.<sup>6</sup> and Simpson v. Union Oil Co.<sup>7</sup> In both cases, suppliers were using their power over dealers to force the acceptance of restrictive marketing arrangements (tying in the first instance, consignment selling in the second). In neither case was it shown that competition in final product markets—oil and gasoline—was directly affected by the arrangements.

#### H

## Noncollusive Restrictions on Sales Territories and Customers

This paper focuses primarily on the economic impact and public policy status of restrictive arrangements involving the limitations of distributors in their selection of sales territories or customers. We omit detailed consideration of resale price restrictions, except as they may be involved in our primary topic, because they have been the subject of extensive analysis for some thirty years and their legal status as per se violations, except where specifically exempted by state law, seems reasonably secure and appropriate. Product restrictions in the form of tying contracts are

<sup>&</sup>lt;sup>6</sup> 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).
<sup>7</sup> 377 U.S. 13 (1964).

<sup>&</sup>lt;sup>6</sup> The economics profession, with very few exceptions, has been generally critical even of legalized resale price maintenance. The typical argument is well summarized by Bain, who recommends the repeal of state fair trade laws and federal enabling legislation. Bain, op. cit. supra note 1, at 565-67, 627; a similar suggestion is made by Kaysen & Turner, op. cit. supra note 1, at 212-13. The outstanding economist proponent of fair trade, as a source of countervailing (or perhaps only equalizing) power for small business, has been Walter B. Adams. Cf. Adams, Resale Price Maintenance: Fact and

covered in another contribution to this symposium; exclusive dealing restrictions, which are frequently associated with customer-territorial restrictions, require some specific comment below. In general, the several types of restrictions may be used both jointly and as alternative means of accomplishing the same managerial objective.

Territorial and other customer restrictions may be analyzed together because they have the common effect of limiting the distributor in his choice of customers, according to their trade designation, size, location, or other characteristics. Territorial restrictions, the most familiar form of simple franchise, have given rise to a number of significant recent court cases, and the territorial feature is emphasized in much of this discussion; however, the argument should be read as equally applicable to the limitation of choice of customers on any other basis.

The focus of this symposium on single-firm conduct excludes a detailed consideration of the use of restrictive distribution arrangements in a context of horizontal collusion or conscious parallel action. It might, however, be argued that all restrictive arrangements of any significance contain, at least by implication, a collusive aspect. Distributors who are parties to such agreements are generally aware that parallel arrangements are being made with their potential competitors; thus, the granting of an exclusive franchise to a distributor is an implicitly collusive quid pro quo for his acceptance of a limited territorial or customer outreach. This is, in essence, the crux of the argument for the extension of per se standards of illegality to cover restrictive arrangements of all types. We would distinguish here, however, between (1) a horizontal conspiracy implemented through a vertical agreement and (2) a single firm's (e.g., a supplier's) development and implementation of a system of vertical agreements for the accomplishment of its own marketing goals. Current public policy does not differentiate the two cases in so far as price agreements are concerned.9 However, in his concurrence in White Motor, Mr. Justice Brennan explicitly distinguished "two traditionally outlawed forms of restraint-horizontal market division and resale price maintenance"-from "territorial restraints . . . imposed upon unwilling distributors by the manufacturer to serve exclusively his own interest."10 The latter were, in his view, presumably legal.

Fancy, 64 YALE L.J. 967 (1955). Other recent contributions analyzing the impact of fair trade practices in a managerial context are Telser, Why Should Manufacturers Want Fair Trade?, 3 J. LAW & ECON. 86 (1960); Gould & Preston, A Model of Resale Price Maintenance, 32 ECONOMICA 302 (1965).

<sup>&</sup>lt;sup>9</sup> KAYSEN & TURNER, op. cit. supra note 1, set forth some explicit standards for the appraisal of per se rules and accept the validity of this approach with respect to price-fixing, atlhough not with respect to tying contracts or exclusive dealing. They do not deal specifically with customer-territorial restrictions. Turner, writing alone, offers purpose and power to restrain competition as a test for identifying per se illegal tie-in arrangements, although he leaves some classes of arrangements for case-by-case analysis. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 HARV. L. REV. 50, 62 (1958). The validity of per se rules even in the price-fixing context has been strongly challenged by the economic analysis of Almarin Phillips. See his MARKET STRUCTURE, ORGANIZATION AND PERFORMANCE chs. 10-11 (1962).

<sup>10</sup> White Motor Co. v. United States, 372 U.S. 253, 266-67 (1963).

Absent horizontal conspiracy, restrictive distribution arrangements arise because distributors, left to their own devices, do not behave as a supplier would wish and, as a result, the goals of the supplier are not realized through the independent action of competitive distributors in the market.

The motives of a supplier in introducing restrictive marketing arrangements may be many and varied, but the following are frequently cited in the literature and

court proceedings:11

I. To obtain market access—Distributors may be unwilling to handle a supplier's product unless they are partially insulated against intrabrand competition; thus, distribution outlets in any one submarket may be obtainable only if restrictions are imposed on the activities of potential competitors. This consideration is particularly significant when the distributors are required, either by economic considerations or trade practices, to deal exclusively in the supplier's product.<sup>12</sup>

2. To increase product exposure—If final market sales are strongly affected by the number and convenience of distribution outlets carrying the product, then the supplier may wish to limit each outlet to minimum feasible size and increase the

number of outlets to a maximum.

3. To increase total distributors' sales effort—Any particular amount or quality of sales effort might be spread widely through a market or concentrated on narrowly defined customer groups. Customer-territorial restrictions are frequently designed to motivate distributors to increase their depth coverage of narrowly defined markets rather than "skimming" choice customers over a wider area.<sup>13</sup>

4. To determine quality and character of distributor service and to achieve other merchandising ends—In order to engage in brand name promotional activity on a continuing market-wide scale, a supplier may wish to obtain both specific character and quality and a considerable degree of uniformity in the operations of its distributors, including not only pre-sales service but also post-sales and replacement responsibility, ancillary merchandising activity (e.g., local advertising), and so forth. Restriction of customer groups, territorial or otherwise, to specific distributors may contribute to these goals, either because the distributors independently accept the

It is sometimes argued that many restrictive arrangements are actually in the distributors' best interests and that the supplier simply develops and enforces them "for the distributors' own good." It may indeed be true that some suppliers, through the ability to study the entire market and to consider a wide range of managerial alternatives, are peculiarly well situated to advise, assist, and even persuade distributors to follow more profitable operating procedures. However, it presupposes both an undue omniscience on the part of suppliers and an undue denseness on the part of distributors to argue that the latter must be continually compelled to follow courses of action in their own best interests.

<sup>&</sup>lt;sup>12</sup> A special case of the "market access" motive involves new products, for which the territorial monopoly may be an important stimulant to investment in promotional activity and risk-taking on the part of distributors. Use of restrictive arrangements with respect to new products would not explain their persistence over time; however, the new product case is a powerful argument against per se prohibition of all customer-territorial restrictions, as the courts have apparently recognized. Cf. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), aff'd, 365 U.S. 567 (1961). Compare Jerrold Electronics Corp. v. Wescoast Broadcasting Co., 341 F.2d 653 (9th Cir. 1965).

<sup>13</sup> This and the following point are particularly emphasized by Jordan, supra note 1, at 113-22.

appropriate norms and standards or because they can be persuaded to do so in return for competitive insulation.

A large number of more specific considerations might be listed, but the foregoing include the principal points in the literature and already involve some duplication. It may be relevant, however, to ask why a supplier would prefer a restrictive arrangement to the complete control of a distribution outlet through vertical integration. Three characteristics of distributive activity are of paramount importance in this connection.<sup>14</sup> First, distribution is a relatively low-profit activity; if a supplier can obtain the desired degree of control without assuming full investment responsibility, he may be able to employ his capital more profitably elsewhere. Second, distribution is typically a multiproduct activity, with the product mix of distributors substantially different from that of any one supplier; vertical integration under these circumstances involves a substantial broadening of a supplier's product responsibility as well as his functional role.<sup>15</sup> Finally, the local managerial problems and personal service content of distribution discourage suppliers from integrating forward when other alternatives are available.<sup>16</sup>

#### Ш

#### A Model of Customer-Territorial Restrictions

The courts have clearly held that at the present time restrictive distribution practices are not per se illegal in the United States under existing statutes, and we have cited above a number of legitimate business considerations that might motivate a supplier of merchandise to introduce restrictive arrangements among his distributors. It remains, however, to inquire whether or not the introduction of such arrangements will necessarily, or even probably, result in some reduction in the strength of competitive forces in the economy. In order to examine this question, we construct an abstract model of a spatial market and examine the impact of restrictive practices on this market under certain specified conditions. From the results of this analysis we are able to suggest some generalizations that might serve to identify instances of restrictive distribution permissible under a pro-competitive public policy.<sup>17</sup>

<sup>&</sup>lt;sup>14</sup> For the most recent general survey of the economics of distribution in the United States, see REAVIS COX, DISTRIBUTION IN A HIGH-LEVEL ECONOMY (1965).

<sup>&</sup>lt;sup>15</sup> The principal form of retailing in which manufacturers exercise a dominant decision-making role, including formal vertical integration in some instances, is gasoline marketing; the second most conspicuous example is automobile dealerships. In both instances, the principal product of the supplier is also the principal product of the retailer. The former do not, in general, involve customer restrictions other than those arising entirely out of physical location, but the latter have involved very explicit territorial restraints in the past and continue to do so in some cases. *Cf. B. P. Pashigian, The Distribution of Automobiles ch. 2 (1961)*; Travers & Wright, *supra* note 1, and references therein.

<sup>16</sup> Similar points are made by Travers & Wright, supra note 1, at 834, and Stewart, supra note 1, at

<sup>&</sup>lt;sup>17</sup> To interpret the model as a case for customer restrictions by industry, read each "location" as a different class of customer, with the proximity of locations reflecting the similarity of product require-

As the framework for our model, assume the existence of a set of potential market locations evenly distributed along a line in space. Potential customers of different sizes (size measured by potential volume of purchases) are distributed evenly along the line, and the size distribution of customers is the same at each location. We analyze the problem of a single supplier and its associated single-product distributors in marketing to these potential customers on the assumption that both the final market price and the distributor price are fixed and uniform over all quantities and all customers.

Assume next that the establishment of a distributorship involves one particular amount of capital investment and that the criterion used by distributors in making this investment is the achievement of a specific minimum net rate of return. Assume also that the distributors have three types of variable costs:

- 1. cost of merchandise purchased for resale, which is constant per product unit;
- cost of customer contact, which is constant per unit of distance between distributor and customer; and
- 3. cost of transactions, which is constant per customer.

Under these cost conditions, two propositions hold:

- 1. at any given location, the profitability of distributor sales to any particular customer will be directly proportional to customer size, 18 and
- 2. for customers of any given size, the profitability of distributor sales will be inversely proportional to the distance between customer and distributor.<sup>19</sup>

We would expect a distributor at any particular location to contact potential customers at his own location beginning with the largest and continuing down the size categories until he reached those customers for whom the revenue-cost margin just equalled the cost of making the transaction. Similarly, we would expect the distributor to extend his market coverage to customers at other locations to such a point that the rising contact costs just equalled the net profit (gross margin less transaction cost) attainable. These two criteria define the intensive and extensive margins of market exploitation for the distributor, and his submarket may be described as including all potential customers for whom the revenue-cost margin

ments and distribution channels among classes. The entire argument could also be restated for a single distributor dealing with a group of suppliers; under appropriate cost and demand assumptions, each supplier may obtain the same profit whether he distributes through one or many outlets, but the distributor may benefit from holding an exclusive franchise, even if the result is only to attract customers to other merchandise.

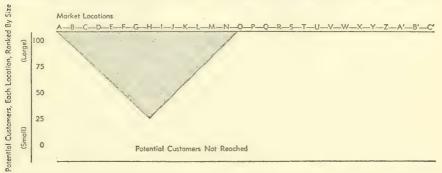
<sup>&</sup>lt;sup>18</sup> The larger the customer, the greater is the aggregate difference between total receipts from the sale and total cost of merchandise; deduct from this aggregate the lump-sum cost of making the transaction to obtain the net profit per customer, which will be directly proportional to the size of the sale.

<sup>&</sup>lt;sup>19</sup> Note that our model includes no source of diseconomies of scale other than the rising contact costs associated with customers in more distant locations. This assumption reflects the general observation that there is a significant amount of permanent excess capacity in most distribution activities. *Cf.* Cox, *op. cit. supra* note 14, ch. 12.

equals or exceeds the sum of the contact and transaction costs. A diagrammatic representation of such a submarket, showing both spatial outreach and customer depth at each spatial location, is presented in figure one.<sup>20</sup>

#### FIGURE 1

DEVELOPMENT OF A DISTRIBUTOR SUBMARKET BY SPATIAL OUTREACH AND CUSTOMER DEPTH



For a distributor at location H, the unit price-cost margin, contact costs over space, and transactions cost determine the spatial limits of the submarket (locations A and O, where only customers of size 100 are serviced) and the depth in terms of customer size (size 25 at location H).

We have assumed that the investment requirements per distributor are fixed regardless of location, number of customers reached, or volume. If the profits attainable from one optimal-sized submarket are greater than would be available from an equivalent amount of capital employed elsewhere, then, with unrestricted entry, we would expect additional distributors to appear. Each of them would select a geographic location such that his spatial outreach did not overlap with any existing distributor, and the pattern of market coverage that would result is illustrated in figure two. Note that a large number of potential customers may not be reached by any distributor under this pattern of coverage.

If the profits obtained from these optimal-sized distributorships were exactly equal

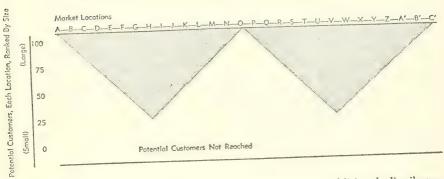
<sup>&</sup>lt;sup>30</sup> The model developed here is the simplest possible one that will illustrate the argument. The spatial dimension of the market is made linear, not circular, as in the more usual example, in order to make it possible to illustrate the concept of market "depth" while keeping the diagram to two dimensions. The triangular limits of the submarket may be interpreted as a vertical cross-section of a cone, in two-dimensional space. When the spatial market is entirely filled with distributors, as in figure three below, the spatial (horizontal) boundaries of each submarket would be hexagonal, as Losch has shown.

The economic literature on "line" and other spatial market models is very large. The single most important theoretical work is A. Losch, The Economics of Location (1954; first published in German in 1940). Essential early references are E. H. Chamberlin, The Theory of Monopolistic Competition Appendices A and C (6th ed. 1950); and Hotelling, Stability in Competition, 39 Econ. J. 41 (1929). The standard general text on spatial economic relationships is E. M. Hoover, The Location of Economic Activity (1948).

A model fundamentally similar to but much more elaborate than that presented in the text is contained in Mills & Lav, A Model of Market Areas with Free Entry, 72 J. Pol. Econ. 277 (1964). This model demonstrates in a more general framework that free entry in a spatial market need not result in the filling of all market spaces nor in the most efficient use of production and transportation resources.

FIGURE 2

MARKET OCCUPANCY BY NONCOMPETITIVE DISTRIBUTORS



to those available from similar investments elsewhere, no additional distributors would be tempted to enter the market, nor could the supplier induce such entry without offering to increase distributor profits through distributor price reduction, subsidy, or other means. However, if the optimal-sized distributors are earning better than normal profits, additional distributors may wish to enter the market. The supplier will also desire such distributors to enter because they can provide additional market coverage. However, wherever such additional distributorships are established, they will include in their submarkets some of the customers already served by the optimal-sized outlets. Thus, the attainment of increased market coverage—desired by the supplier (and by the potential entering distributors)—involves the development of interdistributor (intrabrand) competition and a reduction in the size and profitability of distributorships.

Although new distributors might for a time take customers from established firms simply on the basis of convenience and without altering the basic price and cost relationships of the industry, eventually the encroaching outlets and the established outlets would begin to compete directly for customers. This competition might take the form of price reductions, either selective or across-the-board, or additional expenditures on selling costs. Either form of competition has the same effect upon distributor profits, reducing them below the level they would have reached if the same sales volume per distributor were attained without competition. If the competitive price reductions are market-wide, they will reduce the depth coverage of the market because they lower the profits available from transactions with smaller customers.<sup>21</sup> Even if the reductions are only selective, or if selective selling cost increases are used instead, the profitability of every competitive distributor in the sale of any given volume of product is reduced. This has an

<sup>&</sup>lt;sup>81</sup>We might term this the "perfect competition" result. It implies that price is the only element of competition among distributors, and that final market prices fall until each distributor is earning only normal profits. The spatial market would be full of distributors, but the depth of their coverage would be reduced. The final numbers-spatial-depth outcome would depend upon the investment requirement and cost structure.

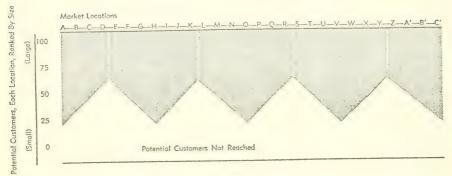
important implication for the supplier. It means—and here is the point—that with direct competition among distributors, their number and size may stabilize so as to provide a lower level of market coverage than a restrictive distribution arrangement would permit; thus, the total sales of the supplier's product in the final market may be reduced under competitive, as compared to restricted, distribution arrangements.

For this reason alone, in a market corresponding to our simple model, a supplier would be well advised to restrict the customers and territories served by his dealers so that they might obtain normal profits on their operations under conditions that result in levels of market coverage, selling price, and sales quantity that maximize his own profits. Since competition will govern the returns of distributors in any event, the supplier has reason to prefer (and the distributors no reason to disprefer) that normal profits be obtained by a maximum number of distributors, resulting in a maximum total sales volume, given the price.<sup>22</sup> The resulting pattern of distributor market occupancy is pictured in figure three.

Two conceptual simplifications involved in this model deserve brief comment. First, we have discussed the introduction of distributors into the market as if it occurred gradually over some time period. From the viewpoint of a decision-making supplier, the situation might be better described in terms of a forecast of possible market developments. Second, we have omitted any consideration of the existence of other suppliers and their associated distributors in the market. Although the number and strength of such competitors raises plenty of management problems, their presence or absence has no great impact on our argument. Either (a) there are no direct competitors, and the potential customers will simply spend their money on other products or increase their savings if the supplier's product is not made available to them, or (b) there are direct competitors such that any sales of this supplier's product are matched by lost sales of another's—or else some combination of (a) and (b) prevails. Whatever the circumstances, if the customers are assumed to have any judgment or taste in the matter, their selection of the particular supplier's product reflects a preference for it over the available alternatives, including the

<sup>&</sup>lt;sup>22</sup> Criteria for the selection of an optimal final market price, total quantity, and number of distributorships by the supplier may be briefly indicated. Larger numbers of distributorships are associated with higher levels of market demand at all final prices; and every size (and, therefore, total number) of distributorship(s) is associated with a particular gross distributor's margin per sales unit, determined by the distributor's capital requirement and minimum rate of return. The supplier would obtain his own net market demand schedules by subtracting the relevant minimum unit margin from each possible final demand schedule, determined by the number of distributors. The optimal number of distributors from the supplier's viewpoint would be that resulting in the highest of these net demand schedules, and the supplier would select the price-quantity combination on this schedule best calculated to maximize his own profits over the market period. A supplier with significant monopoly power in the final market may even increase the number of distributors beyond that compatible with the maintenance of normal profits, either by (a) subsidization, so long as gross profits from increased coverage are greater than subsidy costs, or (b) raising final market price and distributor's unit margin through resale price maintenance. For a diagrammatic development of this point, under slightly different cost conditions from those assumed here, see Gould & Preston, supra note 8.

# FIGURE 3 MARKET OCCUPANCY WITH TERRITORIAL RESTRICTIONS



Distributors are located at A, H, O, V, C', etc.

alternative of saving their money. Thus, there is every reason to believe that the customer population is not directly harmed, and quite possibly benefited, by the establishment of a maximum number of viable distributorships. Whether the establishment of additional distributorships results in an over-commitment of resources to distributive activity in the economy, or in an excessive turnover of management and capital due to bankruptcies, are questions we do not investigate here.

Let us now summarize some principal features of the application of customerterritorial restrictions within this simple model:

- 1. Referring back to our earlier list of motivations for restrictive distribution, the example presented in our model covers the first two motivations (obtaining market access and increasing exposure) exactly. It also has implications, as noted below, for the third and fourth (increasing sales effort and controlling service quality).
- 2. The supplier obtains the best possible coverage of the market, given the structure of distribution costs, and is thus in a position to obtain the best available over-all price-quantity combinations. If competition among suppliers (i.e., among brands) is strong in the final market, then the best available alternative may simply be competitive returns for the supplier himself. On the other hand, if interbrand competition is weak, the supplier may be able to establish a higher final market price and, deducting normal profits for distributors, obtain an abnormal profit for himself.
- 3. The distributors receive only normal profits and are as small and numerous as possible consistent with the price and margin established by the supplier. There is no inconsistency between this result, which arises directly out of the general argument of our model that restrictive arrangements *increase* the number of distributors over what it otherwise would be, and the superficial effect of restrictions in limiting or reducing the number of distributors. The difference lies in the character of the

distributive outlets, their costs, locations, and functions. Our analysis indicates that restrictive arrangements will be used to increase the number of outlets of a specified type or quality; the preservation of such outlets may, of course, require the elimination of potentially competitive outlets with other operating and service characteristics.

- 4. The distributors can be made better off only if the supplier is made worse off and the restrictions are maintained. The removal of restrictions may allow the size and activity of distributors to change but not their profitability. However, if restrictions are maintained but prices raised or markets widened, then distributors may gain while the supplier loses. (Skillful bargaining may allow the distributors to obtain some of these gains as their reward for cooperating with the supplier's plans, even though they could not do as well acting independently.)
- 5. The welfare of final customers is not clearly affected by the selection of restrictive over nonrestrictive distribution arrangements in this model. If competition took the form of selling expenses or free services, these might benefit particular customers, annoy others, or be of no importance. If competition took the form of price reductions, either general or selective, those customers receiving the reductions would benefit. However, whatever the form of competition, there would be some reduction in the coverage of the market as compared to that provided by restricted distribution, because of the reduction in number of distributors if for no other reason. Thus, the gains to favored customers must be measured against the loss of market alternatives to others willing to pay but shifted beyond the breakeven margins by the change in distributor costs. The extension of service to these customers contributes to their own welfare as well as to supplier profits; even if these customers are reached by other suppliers of similar products, the provision of an additional market alternative cannot be dismissed as negligible in all cases.
- 6. Note that in this model the supplier can do nothing to extend the intensive market margin (the depth of coverage) of distributors directly. However, distributors whose range of territorial outreach is sharply limited may find it possible to extend service to extra-marginal customers within their own sales territories on a price-discrimination or reduced-cost basis (which raises some other legal problems, of course). These possibilities are not easily included in our simple model, but they are probably real enough in actual markets to constitute an important side effect of restricted distribution arrangements.<sup>23</sup>

In our abstract model, the competitive structure of distribution limits dis-

amount of investment was required to establish a distributorship, regardless of capacity, location, and so on. This assumption is probably acceptable as a reflection of some minimum level of distributive capacity, and even of capital requirements within each of several size classes of distributors. However, if a distributor in our model can select some level of investment lower than that required to reach an optimal-sized market, he may choose to do so. Such a reduction will raise the rate of return represented by any particular aggregate of dollar profits. The reduction may or may not reduce the distributor's ability to cover his own territorial market in depth; if it does, then the supplier may be motivated to introduce additional stimuli—aids, subsidies, or quotas—to maintain depth coverage.

tributors' profits to normal levels, with or without territorial restrictions, and thus the distributors are assumed to be indifferent as between independence and restricted arrangements. In fact, of course, they may have strong preferences between the two and will almost certainly have preferences as to the particular forms that restrictions may take. Not only are there the extreme possibilities of a monopolistic price-fixing conspiracy among the distributors on the one hand and the reduction of profits below normal levels by a coercive supplier on the other, there are myriad variants in between. If "the greatest of all monopoly profits is a quiet life," the closed territory distributor may value his position for that reason alone. Further, in the process of establishing and maintaining an optimal system of territorial distribution, a supplier may provide extensive managerial and investment assistance, advertising support, and so forth. These forms of aid may be provided at little or no direct cost to the distributor, both because they are undertaken by the supplier in the pursuit of profits from complete market coverage and because their costs, per distributor, are in fact very low for the supplier as a result of scale economies.

#### IV

# A Policy Standard for Restrictive Arrangements

In the language of the Addyston Pipe case, restrictive distribution arrangements are reasonable, and therefore permissible, under the Sherman Act when "the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." The analysis of customer-territorial restrictions developed from our model enables us to propose that this criterion be specified more precisely in this two-part test:

Restrictive arrangements imposed upon distributors individually by a supplier are permissible when—

- they make possible, with no direct reduction in the availability of products
  of other suppliers, a level of market coverage for the supplier's product
  substantially greater than could be attained with overlapping distributorships, and
- 2. they do not result in distributor or supplier profits substantially different from "normal" levels for the risk, skill, and capital involved.

The first part of this test examines the impact of the arrangement on the availability of product and outlet alternatives in the final market and the importance of competitive costs. The second discriminates between the permissible cases and those involving horizontal collusion among distributors, coercion of captive distributors by suppliers, and vertical restrictions supporting a supply monopoly. The key word

<sup>&</sup>lt;sup>34</sup> United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 282 (6th Cir. 1898), quoting Chief Justice Tindal, in Horner v. Graves, 7 Bing. 735, 743, 131 Eng. Rep. 284, 287 (C.P. 1831).

in the second part of the test is *result*; it is not enough that restrictive practices may occur in a context of abnormal profits—there must be some cause-effect relationship between the two.

The simplest case covered by our proposed test—in which neither distributors nor supplier earns abnormal profits but the restrictive arrangement permits extensive market coverage and widens the range of competitive alternatives—would seem fanciful were it not apparently illustrated in a number of recent court proceedings, to which we shall refer specifically below. But what about the more difficult case in which the first criterion is met and there is no evidence of excessive profits or horizontal conspiracy among distributors but supplier profits are abnormally high? The answer depends upon whether or not the supplier profits can be traced to the restrictive arrangement. If the arrangement centers on price maintenance, the supposition of a cause-effect relationship is quite strong. It is possible, but experience suggests very unlikely, that distributor prices are being held up while supplier prices and profits are being held down. On the contrary, one of the classic motives for resale price control is to insulate the supplier from the forces of price competition among distributors and, indeed, to enlist them as partners in the pursuit of monopoly profits.

With customer-territorial restrictions considered alone, however, the supposition seems to run the other way. Their effects upon the level of final market price are, at most, indirect and may run in either direction. They do not contribute to the weakening of the interbrand competition in final markets or serve as barriers to entry. On the contrary, they assure a prospective competitor that in any submarket he will have only one, rather than many, distributors of a particular supplier's product to contend with.

Our test does not specifically cover a particular type of restrictive arrangement that we have omitted from the body of our analysis, namely, the reservation of certain territorial or, more commonly, customer groups (e.g., governmental units) for direct service by the supplier. This pattern of distribution has traditionally given rise to a considerable amount of complaint among the distributors affected.<sup>25</sup> Such practices may indeed reduce the profits of distributors below what they otherwise would be, and the post hoc reservation of new customers initially developed by the distributors may constitute illegitimate coercion or interference. However, where post hoc coercion is not involved, such reservations do not appear to have an anticompetitive effect. Given that the entire flow of merchandise originates with the supplier, his reservation of some part of that flow for his own use, including use in sales to selected final users, cannot be shown to have any necessary impact, either positive or negative, on the over-all strength of competitive forces.

The case against customer-territorial restrictions where suppliers are profitable

<sup>&</sup>lt;sup>85</sup> Cf. Hearings Before the House Select Comm. on Small Business on the Impact Upon Small Business of Dual Distribution and Related Vertical Integration, 88th Cong., 2d Sess. (1964).

or relatively large28 appears to rest on an association between these restrictions and parallel limitations on the range of products marketed by a distributor, i.e., exclusive dealing. Exclusive dealing is, indeed, the obverse of customer-territorial restriction, and there may well be cases in which a supplier desires not primarily the increased market coverage posited in our model but rather the elimination of interbrand competition within individual distribution outlets. The territorial restriction is then the distributor's quid pro quo; if he is to give up the distribution of competitive products, he must be guaranteed a market in which intrabrand competition is eliminated. In arranging such distributorships, the supplier would, of course, be motivated to obtain maximum market coverage, as suggested by our model; however, the analysis of the operation of such a distribution system would include its exclusive feature as well. This feature may well constitute a barrier to the development of new competition, and thus may contribute to the achievement of noncompetitive price and profit levels for both distributors and suppliers. If so, the exclusive dealing aspects of the arrangement would be, and should be, illegal under section 3 of the Clayton Act.27

The test of the permissiveness of restrictive arrangements set forth above is not intended as an across-the-board challenge of the per se rule against vertical price-fixing nor of the Clayton Act's restraints on exclusive dealing and tying. It is, however, intended to suggest that the impact of particular restrictive practices depends upon their context, including their association with other practices, and thus that an extension of per se rules in this area is at present unjustified. More explicit regulations in the trade practices field might arise from either the simplistic extension of per se illegality to all restrictive practices or the identification of particular characteristics of firms and/or markets for which particular practices would be permitted or prohibited. Possible characteristics cited include (a) the profitability and market share of the supplier firm and (b) the number and strength of alternative suppliers in intermediate and final markets.<sup>28</sup> The preceding analysis has

among cases in which substantive restraints are, in fact, involved.

<sup>36</sup> For example, Travers & Wright, supra note 1, at 832-34.

<sup>&</sup>lt;sup>27</sup> Under the Standard Stations doctrine, the legal status of exclusive dealing arrangements appears to turn entirely on "proof that competition has been foreclosed in a substantial share of the line of commerce affected." Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949). The Court has subsequently pointed out, however, that application of this doctrine involves three separable steps: (1) determination of the "line of commerce," (2) demonstration of actual or "threatened foreclosure of competition [in relation to] the market affected," and (3) demonstration that "the competition foreclosed . . constitute[s] a substantial share of the relevant market." Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 328 (1961). For an analysis of the current status of this doctrine, see Bok, The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act, 1961 Sup. Ct. Rev. 267.

<sup>&</sup>lt;sup>28</sup> Travers & Wright, supra note 1. An additional characteristic sometimes mentioned is the strength and form of sanctions included in the restrictive arrangements. Harsh sanctions, such as revocations of franchise and fines (either direct or in the form of a profit pass-through), would render agreements invalid, but those containing only weak penalties or admonitions would be permitted. The distinction being drawn appears to be that between arrangements that are restrictive in substance and those that are only restrictive in form. This criterion may be useful for rejecting particular arrangements as not requiring serious analysis (because of no effect); however, it is of no use in discriminating

already dealt, at least by inference, with the relevance of the first group of characteristics; we now turn briefly to the second.

In considering the number and strength of alternative suppliers, brands, or products in affected markets as a determinant of the permissibility of restrictive practices, we would distinguish sharply between the criteria applicable to exclusive dealing or resale price maintenance, on the one hand, and customer-territorial restrictions on the other. The presence of few alternatives in a product-line or market may indicate that exclusive dealing arrangements have, in fact, already worked to foreclose channels of market access. At a minimum, a pro-competitive public policy would suggest that no barriers be placed on the introduction of new products or brands into small-numbers markets. Similarly, the power to raise prices through resale price maintenance is heavily dependent upon the strength of competitive alternatives; thus, where these alternatives are weak, the possibility of pernicious effects from price control are strong, and vice versa. By contrast, our analysis of customer-territorial restrictions indicates that they may be used to extend market coverage and thereby increase the range of competitive alternatives available to particular customers. Such an increase may have its greatest value, from a public policy viewpoint, in those markets where the number of competitive alternatives is very small. This point is frequently recognized with respect to the introduction of new products and constitutes a kind of "infant industry" defense of business practices otherwise proscribed. However, it is equally if not more important in the maintenance of competitive strength for existing products. It may be argued that the mere presence of customer-territorial restrictions reduces the flexibility and adaptability of marketing organizations over time and thus contributes to the perpetuation of dominant market positions (and excessive profits) for particular suppliers or distributors. However, any such vague theorizing must be countered by the (equally vague) consideration of potential cost reductions, service improvements, and dealer responsibility and continuity attainable within stable organizational structures.

There is one final point to be made in defense of certain restrictive distribution arrangements. With a few exceptions, there is, at present, no explicit public policy commitment for the freezing of particular patterns of marketing organization or particular divisions of aggregate profits among raw materials producers, manufacturers, merchandisers, and distributors and their various sources of labor and materials. Because there is no general public policy stance in opposition to organizational changes brought about by vertical integration (including bona fide agency agreements) not involving mergers, the prohibition of certain interfirm arrangements may stimulate the absorption of market relationships into intrafirm management decisions through integration.<sup>29</sup> Integration is more likely when a distributor can operate efficiently while marketing the products of a single supplier, and this same market characteristic is promotive of exclusive dealing and restrictive

<sup>20</sup> ALMARIN PHILLIPS, MARKET STRUCTURE, ORGANIZATION AND PERFORMANCE chs. 10-11 (1962).

customer arrangements (but not particularly of price restrictions, it should be noted). If the only serious argument against noncollusive marketing restraints is that they may have a general tendency to rigidify market relationships and reduce competitive flexibility over the long term, the substitution of vertically integrated structures does not appear to be a desirable alternative. On the other hand, the prohibition of changes in vertical marketing patterns might introduce an inflexibility into the system equal to or greater than that associated with vertical integration itself. Thus, the continued permissibility of limited restraints, always subject to examination as a result of complaints by injured parties or the finding of public authorities, may make possible the most desirable attainable combination of competitive marketing structure and behavior.

#### V

#### THE STANDARD APPLIED

The final task of this paper is to illustrate the applicability of the principles set forth above to some specific marketing situations. For this purpose we have selected four recent court cases in which question was raised as to the legality of restrictive distribution arrangements. This attempt at application is somewhat dangerous, since neither time nor available data have permitted an exhaustive study of the facts of particular cases, nor can this brief presentation include a detailed statement of all necessary qualifications. However, we choose to incur the risk because application will clarify the intended limits of the public policy standard set forth above and thus facilitate its critical appraisal.

#### A. The White Motor Case<sup>30</sup>

The Department of Justice brought suit against the White Motor Co., a manufacturer of trucks, contending that its franchise agreements constituted per se restraints of trade under the Sherman Act. White franchisees were restricted as to their sales areas, customers, and resale prices; the restrictions applied at both an intermediate "distributor" level and a subsequent "dealer" level of the marketing organization. The Department asked, and the district court granted, summary judgment that the arrangement was illegal. The Supreme Court, however, held that the summary judgment was not justified, except in regard to price fixing, because

this is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us.<sup>31</sup>

<sup>&</sup>lt;sup>30</sup> White Motor Co. v. United States, 372 U.S. 253 (1963), reversing 194 F. Supp. 562 (N.D. Ohio 1963). The lower court proceeding in this case is briefly summarized in Travers & Wright, supra note 1, at 797-801. An important comment supporting the view presented in the text is to be found in Handler, Recent Antitrust Developments, 112 U. Pa. L. Rev. 159, 161-70 (1963).

<sup>81</sup> 372 U.S. at 261.

The case was remanded to the district court for trial, and eighteen months later a consent judgment was entered under which White, in essence, agreed to discontinue the restrictions on its franchisees' sales territories and customers.<sup>32</sup> Thus, the impact of the entire proceeding on White's marketing activity was substantially the same as if the summary judgment had been upheld.

White Motor is among the 100 largest industrial firms in the United States (ranking ninety-eighth in order of sales in Fortune's 1963 list)<sup>33</sup> and among the ten largest firms engaged in production of motor vehicles and equipment, although it is less than one-fifth the size of Chrysler, the smallest of the big three auto producers, and less than one twenty-fifth the size of General Motors. It is, however, the largest firm specializing primarily in truck production, the next largest being Mack Truck. International Harvester is the other principal competitor in the relevant market. White is thus neither the dominant firm in its industry nor a pygmy newcomer engaged in a battle with the giants. In arguing that the case required a trial on its merits, White stated that its territorial restraints were necessary to the maintenance of its distribution network in competition with that of other manufacturers:

The plain fact is, as we expect to be able to show to the satisfaction of the Court at a trial of this case on the merits, that the outlawing of exclusive distributorships and dealerships in specified territories would reduce competition in the sale of motor trucks and not foster such competition.<sup>34</sup>

It also contended that its customer restrictions, which prohibited franchisees from soliciting business from governments and certain large accounts, were designed to permit White Motor sales representatives to deal directly with these accounts in competition with similar representatives from other truck manufacturers. The resale price restrictions were said to be ancillary, having as their purpose the maintenance of a particular discount structure for the various classes of accounts.

Leaving the price restrictions aside as per se violations whether or not they had any specific anticompetitive impact in this instance, it would appear that the conditions as set forth by White Motor would, if true, satisfy the standards for permissible customer-territorial restrictions presented in the body of this paper. The effects of the territorial restrictions in increasing the number of dealerships, extent of market coverage, and, therefore, the range of competitive alternatives in the covered markets, seem to have been clearly recognized by the Supreme Court and particularly by Mr. Justice Brennan in his concurrence.<sup>35</sup> Justice Brennan, however, makes explicit objection to the customer reservations placed upon White franchisees, which we would defend. White's right to distribute all of its products through wholly-owned distribution outlets is unquestioned; however, Justice Brennan

<sup>82</sup> United States v. White Motor Co., 5 TRADE REG. REP. (1964 Trade Cas.) ¶71195 (N.D. Ohio, Sept. 8, 1964).

<sup>&</sup>lt;sup>88</sup> Fortune, July 1964, p. 182. <sup>84</sup> Quoted in 372 U.S. at 257.

as Id. at 264-75.

accuses White of seeking "the best of both worlds—to retain a distribution system for the general run of its customers, while skimming off the cream of the trade for its own direct sales. That, it seems to me, the antitrust laws would not permit." The logic of this position is not evident. Although White's specific justifications for this practice may be criticized, the fact remains that neither in economic theory nor in law is there any particular connection between the extent of vertical integration and the strength of final market competition. The implication of Justice Brennan's position seems to be that customer reservation is in some way unfair to distributors, but how these distributors would be made better off by the elimination of their distributorships and the transference of all White's sales activities into vertically integrated outlets is not specified. By our standard, and on the basis of the limited information available, the White Motor distribution system, apart from its resale price restrictions, would have been permissible. The same and the transference of the same activities into vertically integrated outlets is not specified. By our standard, and on the basis of the limited information available, the White Motor distribution system, apart from its resale price restrictions, would have been permissible.

#### B. The Sandura Case<sup>38</sup>

Sandura Co. is a relatively small producer (1962 sales of \$11 million) of medium- to low-priced hard-surface vinyl floor coverings. It is engaged in competition with Armstrong Cork, Congoleum-Nairn, and Pabco, major producers of hardsurface floor coverings, and with a wide range of alternative products and floor treatments as well. The company's principal product, Sandran, is an inexpensive and easily installed vinyl produced by a patented rotogravure process, which was first placed on the market in 1949. After a rapid sales growth, the product revealed serious technical flaws, and sales deteriorated substantially as a result. After remedying these defects, the company again launched a program of expanded distribution. The expansion was accomplished under great financial restriction, due to the heavy losses on sales and repossessions of defective merchandise. Almost no funds were available for advertising, and, indeed, the distributors and retailers were expected to take on primary responsibility for sales promotion and merchandising. Sandura offered its distributors closed territories, within each of which the designated firm would have exclusive right to sell Sandura products to retail dealers, and limited retail competition by restricting the resale prices at which its products could be sold.

The Federal Trade Commission charged that the entire distributorship program constituted an unfair method of competition in violation of the Federal Trade Com-

<sup>86</sup> Id. at 274.

<sup>&</sup>lt;sup>87</sup> White's franchise agreements also included an exclusive dealership clause, such that each franchisee agreed not to handle competitive products. Although this clause was probably irrelevant with respect to the trucks themselves, it may have had some restrictive effect with respect to parts or accessories. These arrangements were explicitly not held to be per se illegal in the district court, and thus did not come to the attention of the Supreme Court; nor is this exclusive arrangement reached by the consent decree.

<sup>&</sup>lt;sup>88</sup> Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964), affirming 61 F.T.C. 756 (1962). See also Stone, Closed Territorial Distribution: An Opening Question in the Sherman Act, 30 U. CHI. L. Rev. 286 (1963).

mission Act.39 The hearing examiner found that the evidence failed to establish any injury to competition but held that the arrangement was illegal per se, and the Commission affirmed this view. 40 The Commission's decision appears to rest importantly upon the view that the territorial arrangements were intrinsic elements in a retail price-fixing scheme that was per se illegal. On the appeal, however, the court of appeals pointed out that the dealer franchise plan establishing resale price maintenance antedated the territorial distribution system and did not appear to be directly connected with it. Thus, although the Commission was entirely justified in its findings with respect to price fixing, the court found that "closed territories made for the vigor and health of Sandura, increasing the competitive good that flows from interbrand competition without any showing of detriment to intrabrand competition."41 The court explicitly observed, with respect to the possible inference of horizontal conspiracy, that "no distributor is shown to have made unreasonable profits" and "the mere fact that distributors refuse to handle a product without closed territories is not sufficient basis for finding a horizontal conspiracy among them." In modifying the Commission's opinion, the court concluded that "this case is barren of credible evidence that the public would be benefited by requiring that Sandura distributors be allowed to intrude on each other's territory . . . . [O]n this record, the only justified conclusion is that elimination of the closed territory arrangement would impair competition, rather than foster it."42

The conclusions of the court of appeals in this case are so clearly aligned with that of the preceding argument that further comment is not required.<sup>43</sup>

#### C. The Schwinn Case44

Arnold, Schwinn & Co. (Schwinn) is a family-owned corporation engaged in the manufacture of bicycles, parts, and accessories. It has one manufacturing plant in Chicago and accounted for 22.5 per cent of the United States bicycle market in 1951 and 12.8 per cent in 1961. During that time, its marketing organization included distributors (wholesalers) and franchised retailers. Each of the former were allocated closed sales territories, and each of the latter was prohibited from purchasing from distributors outside the territory to which they were assigned. The enforcement of this arrangement was greatly facilitated by the "Schwinn Plan," under which distributors simply made sales contacts with retailers, who were then supplied directly from the factory. Distributors received a sales commission under this plan, which accounted for roughly one-half of Schwinn's sales. Consignment

<sup>38</sup> Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-46, 47-58 (1964).

<sup>40 339</sup> F.2d at 855. 41 Id. at 858.

<sup>42</sup> Id. at 858-59.

<sup>45</sup> A similar analysis and conclusion could be offered for the court of appeals decision in Snap-on-Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963).

<sup>44</sup> United States v. Arnold, Schwinn & Co., 237 F. Supp. 323 (N.D. Ill. 1965).

selling and bona fide agency arrangements were also used in some instances. Final retail sales prices were forcefully suggested by Schwinn. In 1958, the Department of Justice complained that these distribution arrangements, "all aspects of which are so completely interwoven and interinvolved as to constitute one, over-all, nation-wide combination and conspiracy," violated section 1 of the Sherman Act.

The district court found no convincing evidence of price-fixing conspiracy. Further, the court noted strong similarity in the arrangements Schwinn had made with respect to franchised distribution and the intrafirm arrangements made by "its giant bicycle competitors, Sears, Roebuck and Co., and Montgomery Ward and Co." and found no fault with franchising as such. However, after an extensive review of the economics of bicycle distribution and Schwinn's own marketing analysis conducted over a period of years, the court found that, although "the general picture . . . of territorialization—one distributor for a general area, and one retail dealer for a particular locality— . . . is sound economically and perfectly legal," the pattern by which territories had been divided among distributors was essentially one of horizontal conspiracy. "Schwinn has a right to assign primary responsibility to a distributor in an area or territory" and the rights of a principal in any bona fide agency arrangement.

However, when a distributor fills orders from warehouse stock that he has purchased . . . he is acting as an owner . . . . It matters not that no actual damage has been shown to any distributor or dealer. Such division of territory by agreement between distributors is horizontal in nature, and whether agreed upon after being imposed or even merely suggested from above . . . by the manufacturer does not alter its illegality . . . . 48

It is difficult to distinguish the Schwinn arrangement, taken at face value, from that in Sandura or White Motor. However, it appears that a careful examination would reveal that the Schwinn arrangement is proscribed under our proposed standard. The crucial question is the first part of our two-part test: Does the arrangement increase market coverage over what it otherwise would be? From the findings of fact summarized in the opinion of the district court, there appears to be no problem in obtaining adequate market coverage for Schwinn cycles. On the contrary, it would appear that Schwinn is one of the leading producers of quality bicycles in the country, and its products are in demand throughout the distribution system. Thus, terriorialization does not appear to extend Schwinn's markets in any way but simply to reduce possible competitive contacts between Schwinn distributors and dealers. Whether this reduction in competition has any effect on profits we are not

<sup>45</sup> Id. at 326.

<sup>40</sup> Id. at 334.

<sup>47</sup> Id. at 340.

<sup>48</sup> Id. at 342.

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able to determine from the material available, but this issue is only secondary under the circumstances.<sup>49</sup>

# D. The Sealy Case 50

Sealy, Inc., is a patent and trade-mark holding corporation engaged in the business of licensing bedding manufacturers to produce and sell mattresses, foundations, and other bedding items under the Sealy name. Under the licensing agreements, manufacturers were restricted both as to their geographical sales areas for Sealy-labeled products and as to their resale prices. The Department of Justice charged that these arrangements were *per se* illegal under section 1 of the Sherman Act. The district court accepted the Department's view with respect to the price-fixing arrangements, but upheld Sealy's contention that the territorial restrictions were "merely ancillary to . . . several entirely legitimate business purposes . . . ."<sup>51</sup>

The history and internal organization of the Sealy organization are reviewed in some detail in the opinion, and that review cannot be repeated here. However, it is essential to note that the principal Sealy licensees were also stockholders and directors of the holding company. Thus, holding company decisions as to prices and territories were to a considerable extent horizontal agreements among some of the parties involved. Although parties to a particular territorial dispute were excluded from its final adjudication at the corporate level even when the parties were directors or members of the executive committee, the continuous interaction of licensees in the determination and realignment of territories is evident from the record. Sealy did not restrict its licensees from the production of bedding under their own or other labels, nor did the territorial restrictions apply to sales of such products; the effect of restrictive agreements in one product line on the manufacturers' policies with respect to others is not revealed in the material at hand.

It would appear that the Sealy arrangement would not be permissible under our proposed standard. It is true, as the court observed, that the history of Sealy shows a continuous expansion in the number of licensees and in the extent of market coverage. What the evidence does not appear to show, however, is that the territorial restriction contributed to this expansion, except insofar as it supported the price-fixing scheme. This may suggest that the territorial restraints, in themselves, are of negligible significance; indeed, the initial territorial limits appear to have been set in terms of break-even freight rate comparisons (i.e., "natural markets"). The "entirely legitimate business purposes" for which the territorial restraints were established and maintained, according to the court, were "royalty

81 Id. at 80073.

<sup>&</sup>lt;sup>49</sup> The Schwinn case is a likely one for the substitution of quasi-integration, through agreements, for territorial restrictions; however, the restrictive arrangement cannot be defended on this ground alone.

<sup>&</sup>lt;sup>50</sup> United States v. Sealy, Inc., 1964 Trade Cas. ¶ 71258 (N.D. Ill.), appeal docketed, 33 U.S.L. Week 3404 (U.S. June 9, 1965) (No. 238).

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income . . . and the benefits to licensees of joint purchasing, research, engineering, advertising and merchandising." However, nowhere in the opinion is the association made clear between these "purposes" and the restraints themselves, except in so far as the "purposes" were realized through the illegal price-fixing arrangement. Therefore, on the basis of the material available, it would appear that the territorial restrictions had, in fact, significance only as part of the over-all price-fixing conspiracy and have no justification for continued existence. The tolerance of the court for these restraints may, in fact, rest upon an assumption that, in the absence of the price-fixing arrangement, the ancillary restraints are purely formal. However, the possibility that these arrangements might serve as a substitute for the pricing agreement, or that they may otherwise restrain the behavior of the parties with respect to their own-brand products, suggests that the territorial restraints themselves may have significant anticompetitive impact.

### E. Concluding Comment

The joining of territorial restrictions with price-fixing agreements in all of these cases, and in many other marketing arrangements as well, suggests the possibility of "guilt by association," and such associations no doubt lend support to extensions of per se rules of illegality to cover all restrictive marketing practices. However, the record to date is hardly conclusive. It may be that the continued accumulation of evidence will show that the great bulk of restrictive agreements fall within the Sealy-Schwinn format, in which territorial restraints do not appear to offer any expansion in the strength or scope of competitive forces. If so, a per se rule would be justified in terms of judicial clarity and managerial convenience. On the other hand, the White and Sandura evidence indicates that there are instances where, at a minimum, there is a strong presumption on the other side. This brief review of recent case material suggests the necessity for continuing detailed scrutiny of each case on its merits and the development of formal rules only after many more instances have been subjected to detailed examination. Although it can be easily argued that, as a matter of public policy, a minimum of restraints should be allowed on the working of the competitive enterprise economy, the concept of restraint must include not only limitations placed upon one private party by another but also limitations placed upon private parties by governments and courts.

<sup>62</sup> ld. at 80083.

Dr. Preston. Thank you very much.

This is my third appearance before the Subcommittee on Antitrust and Monopoly, and I have also presented testimony before the Senate Select Committee on Small Business, and the Joint Economic Committee.

On all of these occasions, I have appeared as an independent academic witness at the invitation of the committees themselves. I have served in the past as a consultant to the Federal Trade Commission; and I was a member of the White House Task Force on Antitrust Policy—that is, the Neal Committee—during the Johnson Administration.

I served as staff economist for the Council of Economic Advisers during the Kennedy administration; and I am currently an active consultant to the Antitrust Division of the U.S. Department of Justice and also to the Department of Justice of the State of California.

I am also a consulant to the Seven-Up Co. and, from time to time, to various other private firms and law firms. I appear here today at the

request of the National Soft Drink Association.

Now, Senator, as I understand it, there are two main issues being discussed in these hearings. One is the very general issue of what is and what should be the legal status of the territorial franchise system.

as a general matter.

The second issue is much more specific. It is something like this: Whatever the answer to the first question, or pending its resolution—Since it is a complex question that cannot be easily resolved—is there any ground for special consideration of the franchise system in the soft drink industry?

On the first matter, I would like to draw the committee's attention to my article in the 1965 summer edition of "Law and Contemporary Problems," which was an invited article dealing with this general

issue.

I made an attempt to deal with it there. I think I still hold the views that I held at that time. Briefly, my view was and is that there is no economic ground for the wholesale condemnation of the territorial franchise system. There are procompetitive effects; there are situations where there may not be competitive effects; and the ground is laid for examination of individual issues on a case-by-case basis but not for wholesale condemnation.

That is where I came out in 1965, and I am still there.

Now, with respect to the second question, the special characteristics of the soft drink industry, I have been spending some time, for a few months now, trying to get more familiar with the industry, and see what the effects of the franchise system and its removal might be.

As a step toward improving my own understanding of the industry, I prepared the data in exhibition 1, which is on pages 13 and 14 of

my testimony, and I would like to draw your attention to it.

My purpose here is not to present definitive statistics, but rather to draw attention to what seemed to be the main dimensions of analysis that have to be considered if one is going to analyze the economic situation in the soft drink industry and the diversity of the industry within these several dimensions.

Just briefly, of course, we have the dimension of brands and companies, which has been discussed here at great length. We have the

dimension of product form, both as regards packaged product versus bulk, and the various types of packages and the trends that have occurred there, and also the various types of drinks in terms of flavor. We have the various characteristics of bottlers—the company-owned plants, the franchised plants, large, small subsidiaries, and so forth.

By the way—in addition to the percentages I have put in the published version here, on the top of page 14, "franchised plants, small, specialized," which account for 93 percent of the plants according to the data I have—judging from the data Mr. Ward gave yesterday, these plants account for 3715 percent of the sales in the industry, a

figure that I did not have before.

I find that useful to put in there myself.

We also note the bottler product mix—that is, the distinction between single- and multiple-line bottlers—and their varied territories. Your maps on the wall show some interesting things about these territories. There has been a lot of discussion about the maps, and

especially a lot of discussion about the white space.

I would like to draw attention to the colored space, and, in particular, the pictures that would emerge if you put the four maps one on top of the other and looked at the colored spaces. The interesting thing to me is that the territories overlap in all kinds of complicated ways that is, colored space on one map with white on another, and parts of one colored area with parts of another.

This indicates, I think, some of the variety of competitive conditions that exist in local soft drink markets. That is, there are large bottlers competing with large bottlers; large bottlers with small; and large bottlers competing in overlapping territories extending out into various directions, into other parts of other territories in different brands.

This is part of the variety of the industry. It is very easy to over-

simplify it.

The fifth item on my list is the type of retail outlet, distinguishing the chain supermarkets, because of their volume and buying power, from the other off-premise consumption stores, and then from the eating and drinking establishments and other types of outlet like stands and service stations and so forth; and the relative importance of these different types of outlets is quite significant, I think.

Some of the discussion this morning has dealt with this in various ways, and it is good to keep these sorts of percentages in mind, because the demand conditions, the cost conditions, the volume, and so forth,

are going to vary among these different types of outlets.

Now, with respect to price, which is obviously an important dimension for our analysis, one thing I would like to call attention to which I do not think has been quite emphasized enough in the 3 days of hearings—and I have looked at the testimony of the first day, and have been here vesterday and today—is that there are certainly three price levels to be considered here.

One is the franchise company price, that is the price of syrup. One

is the wholesale price, and one is the retail price.

Now, a good deal of the discussion that I have heard has not distinguished clearly enough for me to know what the speaker meant among those price levels, and among the effects of various kinds of changes on different price levels.

I have not had access to any data at all that deal with franchise company prices, so I will make no remark about that because I have no knowledge.

I have had scattered, varied, but quite usable data on wholesale and retail prices from different sources, different brands, different bottlers, different market areas and so forth, of various kinds. I am not sure

about the validity of all of the data, but I get a picture.

The first thing I would say about that relationship—between the wholesale and retail prices—is that it is very incorrect to assume a one-for-one relationship; that is, I have found firms buying soft drinks at, let's say, the same wholesale price per case and selling them at different prices retail. I have found them buying soft drinks at different wholesale prices per case and selling them at the same price retail.

So the wholesale-retail price relationship is very complicated, and this just confirms all the studies that I have ever made and ever read about food marketing-that there is a wide variety of price-margin relationship in food marketing among products and brands and so

Finally, with respect to retail prices themselves, I was struck—and I will say this is the most striking thing I have learned that previously I didn't know, in the course of looking into this industry—I was struck by the great variety of actual prices per ounce of beverage for the same drink, the same brand, the same contents, depending upon pack size

and package form.

Now, these are prices that exist not only in the same market, but in the same store on the same brand. In trying to make a comparison that would be quick and give a rough notion of the variety that I believe exists here. I have constructed a little index there that uses the price per ounce of the large major brand returnable-by large I mean 16 ounce—as 100, and then look at the other prices on a per ounce basis in relation to that index.

The way I would describe the variety that I find is that small packages of the same substance in returnable bottles are from 50 to 100 percent more expensive. The same brand nonreturnable, which usually means a somewhat smaller package, but the package size is variable. from 10 to 50 percent more expensive. And the store-controlled and other brands, most of which are nonreturnable, from 20 percent less to

20 percent more expensive.

The price variety available at retail, even on individual products the same brand in different packs, pack size, and pack form—is really striking. I think that anyone who has not really looked at that should do so, because you will be impressed by the range of choice that the

consumer has.

Senator Hart. This is a terrible time to interrupt, but there is a vote call, and it is an amendment that I am not at all familiar with so I had better take as much time before I have to vote as possible to find out what I am voting on.

We will recess, to resume in about 15 minutes.

(Whereupon, a brief recess was taken.)

Senator HART. All right. The committee will be in order.

Dr. Preston. I was speaking, Senator Hart, with respect to prices and particularly retail prices, and the tremendous variety of retail prices that is observable even in an individual store on an individual brand in the soft drink market, depending on package size and form of

packaging.

Now, one reason for emphasizing this point about prices is that, in making any analysis of the effect of the organization of the market on prices, it is essential to specify what prices are being talked about, and what the relationship among the several prices in the system is or

may be.

In some of the discussion that we have heard here today and also the previous days, there have been comments about "consumer benefits," without making any distinction at all as to what price might be changed or affected by the organization of the marketing system in soft drinks or anywhere else, and without any serious analysis of how the price being discussed would affect consumers. That is, there has to be a consumer price change before the consumer has any experience with it one way or the other.

My point would be that we can imagine a number of different changes in the allocation of what is usually called the marketing margin-that is, the total margin available between the initial producer's cost and the final consumer's price. The total margin available could be redistributed in several different ways, many different ways, with-

out changing the consumer prices at all.

I think some of the points that have been made here have dealt more with the distribution of a given margin than with changes in consumer prices.

These are not the same thing.

Now, with respect to the consumer benefit question, which has been brought up here, I think there is a great deal of uncertainty about how much any particular price would change as a result of any particular reorganization in this industry that might be relevant to the discussion.

Many different numbers have been bandied about. I have not seen any analysis that I would take seriously about the matter. This figure of 30 percent price differences, which appeared in Mr. Ward's statement yesterday and which Senator Harris referred to in his statement this morning, seems to me a figure that should not be taken seriously at all. I have seen no piece of evidence that would suggest there were price differences of that type on any regular transactions in any important part of the soft drink market.

It seems to me the differences one might begin to talk about and the ones that have been cited by some other speakers would be on the order of a few percentage points at the wholesale level. Then the question becomes: What is it at the retail level, and what volume of wholesale transactions is involved in price differences of these few

percentage points!

Now, I am not suggesting that small percentage price differences are trivial, because if they are spread over the whole market, they are not trivial.

The question is: How much of the market is involved? How far in

the market would they be spread?

That is a matter on which I see no analysis at all. I would want to really consider that very carefully if I were going to take any statement about consumer benefits seriously.

Also, even if you begin to estimate consumer benefits on the basis of some chain of hypothetical reasoning, I think you have to consider other aspects here. There are other aspects that might result in consumer losses—and I am going to stress consumer losses, not losses, to individual firms, let us say, or people who are already in the business. I think you have heard from that viewpoint, and it is obviously one that merits your consideration.

But consumer losses can arise in the loss of the minor brands as the minor brands are dropped and as the territories are consolidated.

The increased concentration at the bottler level, the increased vertical integration both forward from the franchise company and backward from the supermarket, and the effects of concentration, vertical integration and various entry on the whole industry—these kinds of changes can also result in consumer losses.

We do not know exactly what the changes will be. We do not know exactly what the losses will be. My point is that we do not know exactly what the gains will be either. If we are going to talk in a bunch of hypotheticals, we need to get the hypotheticals on both sides out in front

of us, and really consider what they might be.

Now, I would like to just conclude by reading this conclusion from my statement on pages 11 and 12; and then open up to question. Senator, in the interest of time.

The conclusions of my analysis can be briefly stated.

I find the territorial franchise system in the soft drink industry to be an economically reasonable form of market organization. It increases both the number of bottlers operating in the economy and number of brands available in local markets, because of the addition of new or minor brands to the major lines of individual bottlers; and hence generates both actual and potential competitive forces within local soft drink markets.

I have seen no evidence to indicate that bottlers as a whole are enjoy-

ing exorbitant profits as a result of these franchise arrangements.

It seems clear that elimination of the territorial franchise system would result in greater concentration at every level of activity in the industry—at the brand—that is, franchise company—level because of the elimination of the minor brand; at the bottler level because of the growth of the large bottlers; and at the retail level because of the buying power of the chain supermarkets.

Along with this increased concentration would come increased vertical integration, both backward from the retail level and forward from the franchisor level. And here I would interpolate, Senator, that there seems to be no argument about the concentration and vertical integration trend that would be promoted. Indeed, several parts of the proposed order from the FTC acknowledge this trend, with the exception

of the supermarket aspect.

It would seem to me that, if one were going to take seriously the proposed order at all, then for completeness the supermarket aspect would have to be added, since the same analysis that suggests forward integration suggests backward vertical integration. We have ample evidence of the interest of the supermarkets in the soft drink industry in all forms, and their increasing share of the soft drink market at retail.

So that, for completeness if nothing else, that would have to be covered.

Setting aside any questions of the legal validity, of the likelihood of such an order being issued, or of whether it would stand up in court or whether it could be enforced even if it did exist—which I think are very important questions -but setting all that aside, there is this clear gap with respect to supermarkets.

And all of these developments involve, of course, the expansion of the share of all soft drinks marketed in nonreturnable containers. If there is any thought of public policy action to stimulate a return to returnables, this would appear to be a step in the opposite direction.

Under all these circumstances, it seems to me extremely unlikely that any substantial decrease in consumer prices of soft drinks would result.

Indeed, even if the supermarket price of major brand nonreturnables declined somewhat—which I think is the strongest effect you could possibly anticipate here, if you give the price decline approach the benefit of every doubt-even if that happened, the resulting shift of demand away from returnables in minor brands might well raise, rather than lower, the average price per ounce actually paid by consumers.

Even if some specific price decrease could be reliably forecasted, the cost savings to specific groups of buyers would have to be balanced against the loss of product variety, increased entry barriers, increased concentration, and elimination of business opportunities associated

with the entire pattern of change.

To repeat: the only sure effect on which everyone seems to be agreed is that the elimination of the territorial franchise system would accelerate the demise of the small bottlers. That is the sure result, and all the other results that have been discussed by me or anyone else are problematical.

I am entirely convinced that territorial franchise systems, operating alone and not as a part of more complex market-control or pricefixing schemes, do not in general constitute harmful or anticompetitive forms of marketing organization in those sectors of the economy in which they typically arise.

On the contrary, as compared to more highly concentrated and vertically integrated alternatives, territorial franchises would appear to strengthen the competitive variety and flexibility of their industry.

Of course, specific instances in which these or any other contractual arrangements do lead to generally undesirable economic effects should continue to be investigated and modified by public policy on a caseby-case basis.

Now, Senator, I would invite your questions.

Senator Hart. Professor, it occurred to us that we should capitalize on the fact that our schedule today brings two academicians together at the same time, inasmuch as Professor Comanor is here.

I wonder if you would be willing to remain at the table, let us have his testimony, and then we could address questions to both of you;

and you might, yourselves, want to exchange opinions.

Dr. Preston. That is quite agreeable with me, Senator, if you would find it helpful.

Perhaps it would be good for me to retire from the table while

Professor Comanor speaks, and then I will-Senator Hart. No, I assume that it would not bother him a bit, and it will save some time.

Senator HART. Prof. William S. Comanor from Stanford University.

Professor?

Mr. Chumbris. I think if the professor would take that mike, because it is tuned into the machine here.

Senator Hart. Dr. Anderson tells me that we might as well make comments for the record.

It is our understanding that only two formal papers have ever been written on the subject of territorial restrictions, and we have the authors of each here. So that makes it even more desirable for some exchange.

I believe that in the prepared testimony of Professor Preston, his article was made a part of the record as an attachment. And we will order Professor Comanor's article printed if it is not part of his

(The article follows. Testimony resumes on p. 442.)

VERTICAL TERRITORIAL AND CUSTOMER RESTRICTIONS: WHITE MOTOR AND ITS AFTERMATH

#### William S. Comanor\*

Contractual arrangements between a manufacturer and his dealers, limiting the customers to whom and the territory within which the dealers may sell, have been attacked persistently under the antitrust laws during the last decade. A recent decision of the Supreme Court has held such vertical restraints to be per se violations of section 1 of the Sherman Act, but that holding was limited to those manufacturer-dealer relationships where the product is actually sold to the dealer. Professor Comanor urges that this is a meaningless distinction, and that all customer and territorial restrictions should be per se violations of the Act, with possible exceptions for those imposed by new manufacturers or by old manufacturers selling new products. In addition to the evident, intended elimination of intrabrand competition, these restrictions make possible product differentiation and its concomitant—obstruction of interbrand price competition. He finds the arguments offered in justification unpersuasive and dismisses the danger that per se condemnation of these agreements will result in the integration of manufacturer and distributor.

#### I. Introduction

Judicial development of the law of antitrust has traced a circular pattern. Although section 1 of the Sherman Act proscribes "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States,"  $^1$  the Supreme Court in  $Standard\ Oil\ Co.\ v.\ United\ States$   $^2$  early announced the "rule of reason," which limits section 1 prohibitions to agreements which are in unreasonable restraint of trade. Yet, when the courts are instructed to examine the competitive impact of an agreement to determine its reasonableness, antitrust litigation becomes prolonged, complex, and unwieldy. To reduce this complexity, the courts since Standard Oil have adopted and increasingly applied the doctrine of "per se illegality": defendants have violated section 1 if they are parties to an agreement categorized

tion 1 if they are parties to an agreement categorized as a per se violation, without inquiry into its reasonableness. Hence, with respect to certain restraints,

the courts have come full circle—section 1 is applied literally.

<sup>\*</sup>Assistant Professor of Economics, Harvard University, A.B., Haverford College, 1959; Ph. D., Harvard University, 1964. The author is indebted to Stephen G. Breyer and Robert K. Johnson for helpful comments and suggestions.

15 U.S.C. § 1 (1964) (emphasis added).

2221 U.S. 1 (1911).

For a discussion of the desirability of reducing the size and complexity of antitrust cases see Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 HARV. L. Rev. 226, 271 n.180 (1960).

The per se concept, however, should be considered a refinement rather than a departure from the rule of reason. Attachment of the per se label to a type of agreement expresses the judgment that the adverse competitive effects of the arrangement outweigh its purported justifications,4 or, at least, that the benefits accruing from the restriction can be achieved by a less restrictive alternative. The role played by this doctrine is summarized in Northern Pacific Railway v. United States,5

[T]here are certain agreements or practices which because of their perinicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the percise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibility complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

The Court has held that price-fixing agreements, both horizontal and vertical a are per se violations of the antitrust laws. Similarly, the Court has found that horizontal agreements allocating territories within which competitors may operate are "tantamount to agreements not to compete, and hence inevitably violative of the Sherman Act . . . . . More recently, agreements, vertical in character, between a manufacturer and his dealers, which allocate territories among the latter and limit the class of customers to whom they sell, have come under attack." This article examines the economic role played by vertical territorial and customer restrictions. It explores their competitive consequences. considers various justifications offered in their defense, and finally, discusses appropriate standards for antitrust policy.

# II. RECENT CASES: A TREND TOWARD PER SE ILLEGALITY

Manufacturing firms in many lines of commerce reach their final consumers through the intermediary of independent franchised dealers. The association between supplier and dealer is frequently marked by agreements restricting the dealers' territory and customers. In the first case involving such restrictions to reach the Supreme Court, White Motor Co. v. United States,10 the Court was unwilling to affirm the lower court's summary judgment which had found that the territorial 11 and customer 12 restrictions contained in the manufacturerdealer contracts were per se violations of section 1:

We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. . . . We need to know more than we do about

<sup>\*</sup>With respect to price-fixing agreements, it was thus decided that "[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) (Douglas, J.).

\*256 U.S. 1.5 (1958) (Black, J.).

\*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951). A "horizontal" agreement is one among firms, usually competitors, at the same stage of production. Thus, agreements among manufacturers, among wholesalers, or among retailers are horizontal.

horizontal.

7 United States v. Parke, Davis & Co., 362 U.S. 29 (1960); see Dr. Miles Medical Co. v. John D. Park & Sons. 220 U.S. 373 (1911). "Vertical" agreements are those among firms or individuals at successive stages of production, such as manufacturer and wholesaler, or wholesaler and retailer. The Miller-Tydings Act of 1937 amended section 1 to exempt from its operation vertical agreements fixing resale prices when such agreements are lawful in the state of resale, 15 U.S. C. § 1 (1964) (proviso).

S White Motor Co. v. United States, 372 U.S. 253, 267 (1963) (Brennan, J., concurring) of United States v. Arneld, Schwinn & Co., 388 U.S. 365 (1967); White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

10 372 U.S. 253, 263 (1963).

11 A typical territorial restriction clause was contained in the original White Motor.

n A typical territorial restriction clause was contained in the original White Motor agreements. It read:

Distributor is hereby granted the exclusive right . . . to sell during the life of this

agreement in the territory described below . . . .

Distributor agrees to develop the aforementioned territory to the satisfaction of the Company. . . and not to sell such trucks except to individuals, firms, or corporations having a place of business and/or purchasing headquarters in said territory, 372 U.S. at

<sup>&</sup>lt;sup>12</sup> A typical customer restriction clause read: "Distributor further agrees not to sell nor to authorize his dealers to sell such trucks to any Federal or State government or any department or political subdivision thereof . . . ." 372 U.S. at 256.

the actual impact of these arrangements on competition to decide whether they have such a "pericious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as per se violations of the Sherman Act.

The inquiry in White Motor did not progress beyond this stage, however, since

the case on remand was concluded by consent decree.

In a more recent case, United States v. Arnold, Schwinn & Co., 13 the Court held that both territorial and customer restrictions are per se violations of the Sherman Act, but it refused to extend this condemnation to agency or consignment arrangements wher the seller retains "all indicia of ownership, including title, dominion, and risk." This discinction between vertical restraints involving sales and those which are part of consignment arrangements is difficult to justify in terms of the underlying consequences of the restraints. While it is clear that some exceptions are required for agency relationships which are internal to the organization of the firm, since "otherwise a department store manager could not tell his sales girls what prices they could charge or from which counters they could sell: they would have to compete with each other," there is little reason for moving beyond this point. Even when formal ownership is retained by the manufacturer, these restraints have the same effect on dealer behavior as they do when ownership is relinquished, and it is this behavior which has a major impart on the degree of competion. Restrictions of this character, moreover, are not a necessary part of agency-type distribution arrangements. Unlike fully intergrated operations where a single organization exists and where outside interference may imply weaker chains of command, distribution by agent is founded on contractual relationship among independent firms, which may readily be altered without necessarily leading to weaker forms of organization and the attending inefficiencies.

#### III. VERTICAL TERRITORIAL AND CUSTOMER RESTRAINTS: ANTICOMPETITIVE EFFECTS

The most obvious undesirable effect of customer and territorial restrictions is the elimination of intrabrand competition. Both types of restriction prevent dealers 15 in a manufacturer's product from competing with one another for the same customers; the dealers, in most cases, are given a monopoly in the manufacturer's product, in either territories or customers. Although this impact alone might appear sufficiently serious to warrant per se condemnation of these arrangements, it is argued in justification that the very restriction of intrabrand competition has the beneficial effect of stimulating and improving interbrand competition. It is crucial, therefore, to examine the likely effects of these restraints on interbrand competition.

### A. Product Differentation—One Cause of Market Power

The degree of competition in an industry—or its antithesis, the level of market power—depends on factors in addition to the number and relative sizes of firms in an industry. One of the more important of these further considerations is the extent to which consumers are willing to substitute among the products of competing firms. When the products of different firms are highly substitutable, consumers by definition are unwilling to pay more for one product than for another, and individual firms cannot set prices which are higher than those of competiting products without suffering a substantial loss in demand. When substitutability is low, on the other hand, demand will not decline significantly even if prices are raised above those charged by rival firms. There is considerable incentive, therefore, for firms to differentiate their products from those of their rivals precisely for the purpose of promoting low consumer substitutability, thereby insulating themselves from the effects of price competition.<sup>10</sup>

<sup>13 388</sup> U.S. 365 (1967)

<sup>14</sup> The Supreme Court, 1966 Term. 81 Harv. L. Rev. 69, 236 (1967).
15 This article assumes for simplicity a two-tier distribution process consisting of a manufacturer and his retailers (dealers).

namuracturer and his retailers (dealers).

16 Not all differences among competing products indicate product differentiation. Various commodities, such as wheat and coal, are produced and sold in a number of standardized grades, and frequently different firms produce different grades of output. In addition, price differences are normally found among the various grades, and these tend generally to reflect differences in production costs. Where differentiation is low or absent, firms can readily switch their production from one grade to another, depending on relative profit

Product differentiation is founded on both real and fancied differences among products, and depends on the basic nature of the product as well as on business policies such as advertising. The degree of differentiation, moreover, varies among classes of customers, being generally greater in final markets where buyers are individual consumers than in industrial markets where buyers are other firms. Fr Regardless of its underlying determinant, however, product differentiation has the effect of restricting the degree of price competition and contributing to the achievement of market power. 18

In many market situations, product differentiation is fairly low among the products of existing firms, but it is often quite high with respect to products offered by new entrants. Where this is the case an important entry barrier exists and established firms as a group are free to raise their prices to noncompetitive levels without danger of enticing new firms into the industry. In this manner,

the degree of competition may be severely lessened.

While product differentiation generally leads to higher prices and monopoly returns, this does not imply that every instance of differentiation is socially undesirable, much less that it should always be condemned under the antitrust laws. The mere departure from the purely competitive model does not alone signify that condemnation is appropriate. Low consumer substitutability often results from real differences among products and from the peculiar skills of attributes of particular firms. In these instances, the price effects of product differentiation are often offset by the social gains resulting from the existence of product variety.10 Even if sufficient market power were achieved to warrant a charge of monopolization under section 2 of the Sherman Act, a defense of "superior skill, foresight, and industry" a might well prevail.

On the other hand, when product differentiation is achieved not by "superior skill, foresight, and industry." but rather by imposing customer and territorial restrictions—agreements which expressly restrict the behavior of independent firms—the offending firm becomes subject to antitrust attack. As argued below, there are no offsetting factors to justify these restrictions, and therefore, since they are likely to promote product differentiation and contribute to the achievement of market power, they are clear violations of section 1 of the Sherman Act.

# B. Dealer Markups and Product Differentiation

Manufacturers have a clear incentive to adopt policies which maximize the degree of product differentiation. Where products are highly differentiated and substitutability is low, consumers behave as though they were tied to the products of specific firms. In this situation, manufacturers can charge higher prices without fear of losing customers. Whether carried out through integrated facilities or through independent dealers, distribution outlets may contribute to the achievement of effective product differentiation. The degree of consumer substitutability can be altered significantly by the commercial policies pursued by a manufacturer's dealers. For this reason, manufacturer-dealer relationships are founded generally on factors which create and foster product differentation.

It is often argued that agreements which establish exclusive territories are less offensive when they are vertical (between a manufacturer and his dealers) than when they are horizontal (among the dealers themselves) because the manufacturer's interests are best served when his dealers' gross markups 21 are maintained at low levels, which is a desirable competitive result, whereas the interests of conspiring dealers are best served when their markups are at high levels, which provides monopoly returns. This argument is founded on the premise.

margins. Since increased output normally leads to lower prices, and reduced output leads to higher prices, this form of transferability of production tends to equalize margins among the products produced by rival firms. On this account, product differences alone signify little concerning the effect of competition on market prices. In this result, however, a significant factor is the ability of firms to switch production between the various grades of output and to imitate their rivals sufficiently well that consumers have few preferences between products of competing firms which will withstand significant differences in price.

13.1 BAIN, BARRIERS TO NEW COMPETITION 114-43 (1956).

25 An empirical analysis of the relationship between profit rates and advertising, which serves as both a source and a symptom of product differentiation, suggests that differentiation is one of the major factors responsible for high degrees of monopoly power. Comanor & Wilson, Advertising Market Structure and Performance, 49 Rev. of Ecox. & STATISTICS 422 (1967).

<sup>422 (1967).</sup>By Chamberlin, Product Heterogeneity and Public Policy, in Readings in Industrial Organization and Public Policy 236 43 (R. Heffelower & G. Stocking eds. 1958).

By United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

By Gross markup' is the difference between manufacturer's and retailer's prices.

unassailable when the manufacturing industry is a single-firm monopoly, that higher markups reduce total retail sales, and that the manufacturer aims, of course, to maximize the quantity of output sold after his own selling price has been set. In the more common case, however, there are a number of firms in the industry and the manufacturer will benefit from dealer markups which exceed competitive levels when the resulting revenues are used by the dealer to create consumer preferences for the manufacturer's products. In oligopolistic markets, where the leading firms account for a substantial share of total output, rivalry generally assumes a nonprice character. In contrast to price changes which can be readily followed, it is likely to be more difficult for competitors to duplicate "product changes" or new selling and distribution arrangements, and these represent various dimensions of product differentiation. Active rivalry thereby serves as a further incentive for the firm to achieve effective differentiation. Business policies which promote differentiation are often a form of inter-firm rivalry at the same time that they serve to limit the development of price competition.

To the extent that product differentiation is fostered by conditions of sale at the dealer level—fancier showrooms or additional dealer services, for example—higher gross markups may be associated with a greater volume of sales. Moreover, what is important to the firm is not the number of units sold but revenues, and it seems probable that higher manufacturing prices will be charged once the product has been effectively differentiated through dealer practices. While there may be some divergence of interests between manufacturer and dealer with regard to the size of dealer markups, there is also a considerable community of interest in terms of practices which promote effective product differentiation. We can note, for example, the apparent concern of manufacturers that their products be sold in attractive surroundings and not in what one executive has called "clapboard shacks." Manufacturer and dealer can both benefit; the higher markups which are required and which result may be a small

cost for the manufacturer to bear relative to the prospective gains.23

### C. Restricting Intrabrand Competition To Protect Dealer Markups

Because the manufacturer and the dealer are both likely to benefit—at the consumer's expense—from the higher dealer markups required for product differentiation, a motive for restricting competition among a firm's dealers is clearly present. The manufacturer cannot bear these costs and assure an adequate markup simply by lowering his price to his dealers, for price competition among his dealers would drive their markups down to the previous levels. Conditions which protect dealer markups and ensure that they will be used to differentiate the product become necessary. Furthermore, effective practices are likely to require the active support of the dealer. For this reason, it may be necessary for the manufacturer to protect higher markups to provide his dealers with a share in the prospective gains as well as to provide the resources required for effective differentiation.

The role of territorial and customer restrictions thus becomes evident. By fragmenting the market among his dealers, with respect to territory or class of customers to be served, the manufacturer protects his dealers' markups from the eroding effects of intrabrand competition. In this respect vertical restrictions have economic results similar to those fashioned more directly through

price fixing via resale price maintenance.

Some customer restrictions directly facilitate the achievement of product differentiation. The attempts of dealers to differentiate the product will be more effective if the product is available only through authorized dealers. Sales by discount houses or other outlets where price is the major condition of sale are hardly likely to promote buyer concern for the peculiar attributes of the products of a particular manufacturer. And this is what we mean by product differentiation. Moreover, these outlets typically sell at lower retail prices than do authorized dealers, which further undermines existing price structures. Manufacturer efforts, therefore, to prevent dealers sales to other than final consumers

<sup>&</sup>lt;sup>22</sup> Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 806 (1962).

<sup>&</sup>lt;sup>23</sup> Although higher gross markups will reduce the total output sold by the industry and also the total joint profits secured by member firms, this may simply represent the divergence of oligopolistic from monopolistic results. Rivalry in terms of "product" may lead to greater levels of differentiation and lower levels of profits, and this is what we should expect.

may be an important component in a program designed to promote differentia-

tion at the distribution stage.

To the extent that these practices are held permissible and adopted by leading firms at the manufacturing stage, the structure of retail submarkets will resemble the national market in manufacturing. Where the market structure is oligopolistic, local oligopolies will be created at the distribution stage. In the end, vertical restrictions not only will eliminate intrabrand competition but also, through their effect on product differentiation, will serve to restrict price competition among the products of different firms.24

# IV. PURPORTED JUSTIFICATIONS FOR VERTICAL RESTRAINTS

Despite the fact that vertical customer and territorial restrictions have substantial anticompetitive consequences, the extent of appropriate antitrust action against these restraints depends also upon whether any competitive justifications for them exist. If not, per se condemnation may be merited; if so, the courts may be forced to examine economic conditions in particular cases to assess the reasonableness of the restrictions. 6:

# A. Encouraging Dealer Investment

It is sometimes urged that vertical restrictions may be necessary to induce prospective dealers to invest capital in buildings and other fixed equipment. In the absence of these restrictions, the argument proceeds, the required flow of funds would not be forthcoming because prospective dealers would fear that strong competition—from other dealerships, existing or potential, or from the manufacturer directly-would drive prices down and make the investment unprofitable. But economic theory suggests that investment in economic activities will be forthcoming whenever the prospective rate of return exceeds the cost of additional capital. So long as the return in an industry is high, enterpreneurs will recognize that profits can be earned by the investment of funds, which are obtained either from internal sources or from capital markets. As demand expands in some markets and contracts in others, the return on investment varies accordingly. And high returns signal for the required level of capital investment even without restrictive agreements. Investment will proceed so long as returns are sufficiently high, but will halt when the additional capital invested in the particular industry drives the profit rate down to the competitive level. Through this process capital funds are allocated among the various sectors of the economy.

The cost of capital, however, includes a premium for risk and uncertainty. Thus, the investment justification for territorial and customer restrictions may be founded on the proposition that, by insulating dealers from the risks of competition, these restraints limit uncertainty and hence reduce capital cost for investment in distribution facilities. While this argument is appealing, we should recognize that a measure of uncertainty is a normal component of the investment process, and it is one which competition generally increases; indeed, "the greatest of monopoly profits is the quiet life." While it is true that an antitrust policy designed to promote competition may increase the cost of capital, that increase may be a small price to pay to avoid the harms associated with a lessening of competition. If it is desirable to increase the rate of capital investment in a particular industry, alternative public programs can be instituted which do not limit the degree of competition and abandon the policies of the antitrust laws.

Given the policy judgment that competition best serves the community's needs, there is no basis for treating dealers differently than manufacturers. At the manufacturing level, we do not consider lower risks of investment a valid justification for horizontal market restrictions. Furthermore, since there are few reasons for believing that the degree of risk or uncertainty is greater in distribution than in other areas, there is little indication that special treatment is required. Even more important, if the risks of investment

<sup>24</sup> This view contrasts sharply with the position taken by Professor Bork. In a recent article he denies this possibility and states bluntly that the "ability of all truly vertical restraints to enhance the efficiency of the integration has been demonstrated by the argument that they can serve no other function." Bork. The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 YALE L.J., 373, 404 (1966). These restraints serve also to promote product differentiation and contribute thereby to the achievement of market power.

in distribution are lowered through vertical restraints, the market process through which capital funds are allocated will be distorted in favor of distribution. The market system is designed to allocate funds among sectors of the economy, and it is necessary to recognize that an efficient allocation of resources is not always served by further capital investment in any single industry. Although these restrictions might provide firms with the capital required to achieve more easily and more fully the patterns of investment which they desire, these patterns are likely to diverge extensively from those which are socially optimal. The funds diverted by these agreements can probably be used more productively

When further investment in distribution facilities is demanded by consumers, the normal functioning of the market will create higher markups and distributor profits—either through lower manufacturer prices or higher final prices. If. however, production costs are too high or consumer demands too low to result in distributor profits sufficiently high to induce capital movement into distribution, society is probably better served by increased investment in other areas.

#### B. Provision of Dealer Services

When manufacturers assert that vertical restrictions are required to ensure "adequate" dealer services, they may well be correct on their own terms. The word "adequate" may simply describe services which are adequate to ensure effective product differentiation. It is quite possible that vertical restrictions are necessary to provide dealers with markups—or prospective markups which are large enough to encourage them to provide credit terms, other dealer services, or advertising—factors which may lead to product differentiation.

While some of these services may be necessary and useful, the need for vertical restraints to ensure their provision indicates only an insufficient demand for them in an unrestricted market. Vertical restrictions, which encourage dealers to provide customer services jointly with the manufacturer's product at a single price. are thus likely to result in the provision of more of these services than would be the case if consumers were free to purchase them separately from the manufactured products. This arrangement is likely also to lead to a joint price which is higher than the sum of the two prices which would be set were the commodities priced separately. A system of joint supply leads to the achievement of product differentiation, increased market power at both the manufacturing and distribution levels, and thereby to both higher manufacturers' prices and higher dealer markups.

Furthermore, a joint supply arrangement means that consumers are compelled to purchase the entire package; the purchase of dealer services is tied to the purchase of the manufactured product. To the extent that the amounts consumed differ from those which would be chosen in separate markets, resources are misallocated at the distribution stage even if dealer markups are only high enough to cover incremental costs. This result seems especially apparent in the case of advertising, for consumers might purchase very little indeed of this "service" were it provided separately. In short, a system of joint products not only fails as a justification for contractual restrictions on competitive behavior, but also is

likely to lead directly to a further misallocation of society's resources.

#### C. Market Coverage

Another justification offered in defense of vertical restrictions is that they lead to increased sales of the manufacturers' products through wider coverage of geographic markets. Since the distribution costs of sales to large nearby customers are frequently lower than those made to smaller and more distant consumers, the manufacturer will benefit if a single price is charged to all customers and the dealer's savings from sales to one group are used to cover the higher costs of sales to the other. While this type of distribution arrangement may indeed lead to wider market coverage than could be achieved by overlapping and competing distributorships, it must be supported by some form of market restriction if dealer competition for sales to low-cost customers is not to destroy the singleprice regime and eliminate the high markups which are used, in effect, to subsidize sales to high-cost customers. But even if significant differences among customers do exist, there is little economic justification for a set of commercial practices which ensures that all customers are charged the same price. Where sales to specific customers are attractive because they reflect lower costs of distribution, the prices charged to these customers should be lower, and competition among distributors would lead to lower prices. Where costs of distribution are high, however, we should expect to find higher prices; at these prices dealers will generally be willing to compete for sales. When dealers do not attempt to sell in an area, however, the conclusion to be drawn may simply be that total product and distribution costs exceed the price the consumer is willing to pay, and that therefore the required distribution outlays should not be made.

Even if a single-price regime is not maintained, it is argued, restrictions imposed on competition among dealers are still necessary to support dealer markups at the levels required to serve high-costs markets. In the absence of vertical restrictions, competitive price reductions may limit the extent of market coverage since it may no longer be profitable to provide selling and distribution services to

high-cost customers

The shortcomings of the market coverage justification for vertical restrictions are similar to those inherent in the promotion-of-investment argument. While market coverage and customer contact may indeed be enhanced by certain types of restrictions, these are gains which are not free to society but which involve a cost. What is important is not whether these restrictions enhance market coverage or customer contact, for this they may well do, but rather whether restrictions of this character are likely to improve the competitive processes through which resources are allocated to these activities. While society generally approves of improved market coverage, it also generally deplores higher dealer markups and higher costs of distribution. Whether the additional gains are worth the additional costs is, of course, the essence of the problem of resource allocation—a problem whose solution we normally leave to the market place.26

There is little reason to believe that vertical restrictions would result in a better allocation of resources. It a substantial number of customers desire greater market coverage, there will be an expansion of demand for the services of distribution facilities and a corresponding increase in the demand for products which are distributed widely. This will give firms with relatively limited market coverage an incentive to increase the number of their distribution outlets. If sufficient demand exists for their products, firms will attain the high retail margins which are necessary to make more intensive distribution possible. This is precisely the process through which the market serves to allocate resources in a socially desirable manner, and it is here also that restrictions on competition

are likely to hinder the achievement of this objective.

#### D. The "Free Ride" Problem

An attempt has also been made to justify vertical restrictions as necessary to ensure that dealers will concentrate their efforts on making sales within their assigned territories rather than attempting to invade the territories of others. It is argued that in the absence of market restrictions, disributors will not undertake costly selling activities but will hope to rely on the efforts of others and to obtain, in effect, a "free ride." 27 They will not provide customer services, such as advertising or repair facilities, within their own market areas as extensively as they would with imposed market boundaries because others will realize the benefits of their efforts. This argument recognizes that facilities such as showrooms will influence sales for a particular dealer and therefore will be provided regardless of the existence of market restraints, but it also emphasizes that restraints lead dealers to supply a greater volume of services.

As far as it goes, this argument may well be correct. Vertical restrictions may be needed to provide an incentive for dealers to supply certain kinds of services. At the same time, however, it ignores the question whether the increased supply of these services, free of charge, by dealers rather than by the manufacturer, is sufficient to serve as a valid justification for market restraints which are

otherwise suspect under the antitrust laws.

Where the impact of these efforts on sales is widely diffused, vertical restrictions probably have little effect in encouraging dealer efforts; in this situation

these activities are generally carried out by the manufacturer himself. In other situations, however, the absence of vertical restrictions may force the manufacturer either to finance selling efforts and customer services which his dealers could perform, or to accept what he regards as an insufficient dealer effort to promote the product and to provide free consumer services. But since "free" services imply only that a single price is charged for both product and service, and since, as noted above, a system of joint supply leads generally to enhanced product differentiation and increased monopoly power, the existence of a "free ride" cannot justify vertical restrictions. To the extent that services are demanded by consumers, a market will develop to supply them and a separate price will be charged. To the extent, moreover, that manufacturers have a legitimate interest in having them provided, they should be forced to bear the cost. In either case, no vertically imposed restrictions are required.

#### E. The Problem of Price Discrimination

It may also be argued that market restrictions among dealers are necessary to allow manufacturers to discriminate in price among customers: it is urged that only by charging lower prices to certain classes of customers can interbrand competition for these customers exist. When a firm sells in a number of distinguishable final markets through its dealers, discrimination is made possible by limiting each dealer to a single market through the imposition of customer or territorial restraints. Were the same dealer to sell in a number of final markets, the manufacturer would lose control over the distribution of sales among final markets, and thereby over the mechanism through which discrimination is achieved.

Thus, the economic concept of price discrimination is based on the ability of a firm to fragment its markets and, despite similar costs, sell the same product at different prices. Higher profits can be earned than even those obtainable by a single-price monopolist if the firm can set a relatively high price for consumers willing to pay it and a relatively low price for those who would not buy if they had to pay the higher prices. Effective price discrimination requires: (1) that buyers cannot move among markets or buy in one market and resell in another, and (2) that firms have sufficient market power to control substantially the prices

of their products.

A common form of price discrimination is found where, as in White Motor, a manufacturer uses restraints on his dealers to reserve large customers for himself. It may be that the responsiveness of these buyers to changes in price is greater than that of the more normal class of customers, and that higher profits are earned when they are charged a lower price while a higher price is charged to others. But if the optimal price to large buyers were less than that paid for the product by the dealers, customer restrictions would not be necessary to achieve this form of discrimination; the manufacturer would need only to charge a lower price than his dealers could set. A recent study, however, found that "a significant number, although by no means a majority, of manufacturers interviewed reported that their price to distributors is normally lower than that given large outside customers." 29 In these situations, the manufacturer will often impose customer restrictions on his dealers to reserve these customers for himself and to eliminate any prospect that his dealers will undercut him. Although distribution costs on sales to large customers are often lower than those to other consumers, these restraints may still be necessary in some cases to ensure that optimal discriminatory prices are established.

Price discrimination fails as a justification for vertical restraints on a number of counts. Although discrimination may well lead to lower, more competitive prices for some customers, at the same time higher, less competitive prices are charged to others. While output will generally be greater in one market, it will generally be smaller in another, and the net result will depend on demand conditions in the individual markets. Regardless of the net change in total output, however, discrimination will foster different price-cost margins as between customers in different markets and thereby will tend to distort the allocation of resources. Furthermore, the increased revenues from discrimination result from the existence of monopoly power and exploitation of an entrenched market posi-

<sup>&</sup>lt;sup>23</sup> High prices are set where the elasticity of demand is low and low prices where the elasticity of demand is high.
<sup>29</sup> Note, supra note 22, at 818.

tion. While such restrictions benefit the manufacturer, there are no corresponding gains to society which outweigh their anticompetitive effects, and private gains clearly do not serve to justify restraints.

## V. INTEGRATION OR VERTICAL RESTRICTIONS

Because the preceding analysis suggests that vertical territorial and customer restrictions have serious anticompetitive consequences and little economic justification, stringent antitrust enforcement seems appropriate. At the same time, it is important to examine the implications of prohibiting these restraints. The primary consideration is that because section I is applicable only to agreement among firms,30 prohibiting these arrangements may encourage the integration of manufacturing and distribution facilities to achieve the same objectives sought in imposing these restrictions. Two inquiries are critical. First, if vertical restraints are condemned, will there be a marked increase in vertical integration? Second, are there grounds for dealing differently with vertical restraints than with vertical integration?

In response to the first inquiry, there are a number of reasons why firms might find it inefficient to operate their own distribution outlets. One article has listed three characteristics of distribution which makes these operations unattractive to manufacturers.31 First, distribution tends to be a low-profit activity, and suppliers would prefer to obtain the desired degree of control without tying up the necessary funds. Second, distribution frequently involves the purchase and sale of many products and the optimal product mix of distributors may differ substantially from the optimal mix of the manufacturer. Finally, distribution is normally associated with local managerial problems and with a high personal service component so that integration may lead to higher cost operations than would exist among independent distributors. In sum, because substantial diseconomies of integration may exist, it cannot be assumed that vertical integration is always a viable alternative to distribution through independent dealers.32 And if integration does not result, condemnation of contractual restraints may lead to more vigorous competition.

Even if integration does result in some instances because of the prohibition of vertical restraints, there are still valid reasons for antitrust action which is limited to contractual restrictions. In some circumstances, economies in distribution result from fully integrated facilities, and these economies may outweigh the competitive loss resulting from integration. With contractual relationships, however, not only are comparable efficiencies less likely, but, even more important, franchise arrangements to achieve possible efficiencies can be maintained in the absence of restrictive provisions.

# VI. SOME CONCLUSIONS FOR ANTITRUST POLICY

When the relevant market at the manufacturing stage is already an oligopoly. we can expect to find a measure of market power present even when vertical restrictions are totally absent. However, it should be stressed that product differentiation is a dimension of market structure which may be as significant to the achievement of monopoly power as is market concentration. And, while they comprise only one facet of product differentiation, dealer services and facilities may play an important role. Indeed, the achievement of competitive levels of prices and profits at the manufacturing stage may be significantly frustrated by product differentiation stemming from practices at the dealer stage.

In the distribution sector, vertical restraints will lead directly to higher markups than would otherwise exist. Although these markups may result in higher

<sup>&</sup>lt;sup>208</sup> Some check on integration might be achieved, however, through \$7 of the Clayton Act. 15 U.S.C. \$18 (1964), if the firm sought to integrate via merger, or by \$2 of the Sherman Act, 15 U.S.C. \$2 (1964), if the integrated firm had monopoly power or if the Sherman Act, 15 U.S.C. \$2 (1964), if the integrated firm had monopoly power or if the facts supported an allegation of an attempt to monopolize.

<sup>31</sup> Preston, supra note 25, at 512.

<sup>32</sup> In the petroleum industry, for example, a recent study found that the franchise system is a far more efficient method of distribution than direct ownership. Salaried managers are subject generally to limitations on the hours a week they can work and also are more prone to the organizational efforts of labor unions. An independent dealer, on the other hand, is not subject to these limitations. A station which is open from 8:90 a.m. until 6:90 p.m., six or even seven days a week is expensive to operate if employees stop work at the end of 40 or 48 hours. The average workweek for independent dealers tends to approach 70 hours. It is not surprising, therefore, that operating costs of stations owned by the major oil companies are estimated to be about one cent per gallon of gasoline greater than for leased stations. Miller, Exclusive Dealing in the Petroleum Industry: The Refiner-Lessee Dealer Relationship, 3 Yale Ecox, Essays 223, 232 (1963).

distributor profits, they will generally be associated with inflated dealer costs. Fancier showrooms or facilities are constructed and more dealer services are provided than would be demanded by consumers in unrestricted markets. To the extent, moreover, that increased market coverage is achieved through vertical restraints, which permit high markups to be set wbut which confine dealers to relatively small territories, excess distribution capacity will result in higher unit costs. In either event, market restrictions lead directly to an inefficient use of society's resources at the distribution stage.

The major line of defense for vertical territorial and customer restriction lies. of course, in the prospect that interbrand competition might be fostered through the suppression of intrabrand competition. This may indeed be true when rivarly is founded on advertising, dealer services, or other factors which enhance the degree of product differentiation. In these areas, market restrictions might well promote greater rivalry. But, while these restrictions might stimulate improvement in the "product" offered by the dealer, they are likely at the same time to impede the growth of price competition and the movement of prices toward costs. While some measure of product differentiation may be desirable, even through price competition is lessened, the attainment of differentiation is not a valid reason for rejecting the normal presumption of antitrust policy in favor of maximum competitive behavior on the part of independent firms. This is especially so since traditional antitrust objectives, which are normally stated in terms of achieving an efficient allocation of resources, are more likely to be secured through the promotion of price competition. And it is in this direction that policy judgments should be made.

A concern with this policy goal would lead to the view that territorial and customer restrictions should be declared per se violations of the antitrust laws. Even in the case of a small manufacturing firm facing a giant rival in an oligopolistic market, these restrictions are understandable. We are concerned with competition as a process for achieving certain social objectives—not merely with the number of competitors in the market—and it is not clear that much is to be gained from bolstering a small and perhaps inefficient rival when this can be accomplished only by market restrictions which sacrifice primary objectives.

There may, however, be two possible exceptions to this per se condemnation: the entry of new firms and the introduction of new products. These activities have considerable social value, which is likely to be underestimated by the market. Because prospective private gains from the entry of a new firm ar the introduction of a new product may understate potential social gains, the free market is likely to lead to less investment for those [Ed.'s note: Copy illegible].

purposes than is socially desirable.<sup>33</sup> And in the case of new products, the highest degree of competition may not always promote the fastest rate of innovation. For these reasons, some form of restraint on competition may be necessary to encourage the development of the distribution facilities which are needed to market successfully a new product or to promote successfully the entry of a new firm. We should recognize, however, that even in the absence of restrictions the original dealers will gain an advantage which will last until more dealerships are created, and probably for some time thereafter. And during this period greater than normal returns will be earned. In determining whether a "new firm" or "new product" defense should be allowed, therefore, the relevant inquiry is whether the gains from a "head start" enjoyed by the original dealers are likely to be sufficiently great to obtain the dealers needed for the introduction of new products or the entry of new firms. Of course, if vertical restrictions are permitted in these exceptional circumstances, the difficult problem remains of determining how long the restrictive agreements should be allowed to continue.34 Too long a period would encourage excessive product differentiation and permit monopoly returns which exceed those required for these social purposes.

Allowing an exception on grounds of new firms or new products is not inconsistent with a per se rule. The per se doctrine itself may simply mean that a certain type of agreement is a prima facie violation of section 1 which can be rebutted only by proof of one of a limited number of justifications. In other words,

market mechanism.

\*\*See United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556-58 (E.D. Pa. 1960), aff'd mem., 365 U.S. 567 (1961).

<sup>33</sup> The entry of new firms into a market is often a pro-competitive factor, while the introduction of new products represents a major dimension of technical advance. Both may represent external economies to the extent that their benefits reach beyond those realized by the individual firm, and therefore some limitation might appropriately be placed on the market mechanism.

the effect may, and perhaps should, be merely to shift to the defendant the burden of establishing the presence of a judicially recognized justification. Nevertheless, such a per se rule still has the extremely important advantage of limiting the issues decided in an antitrust suit, for the question of reasonableness would not be reached unless the defendant can establish an acceptable justification and demonstrate that no less restrictive alternative exists for achieving the justified result.

# STATEMENT OF WILLIAM S. COMANOR, ASSOCIATE PROFESSOR OF ECONOMICS, GRADUATE SCHOOL OF BUSINESS, UNIVERSITY

Dr. Comanor. Let me say that I am very happy to have Professor Preston at the table. He and I have been friends for some time, and I find it strange that we disagree on this point. We generally find ourselves in agreement.

Let me say something about my background. As indicated on the top of my statement, I am associate professor of economics, at the Graduate

School of Business, Stanford University.

My work is in the field of industrial organization and public policy, and I have written a book and nearly 20 articles now on this general

area. Before coming to Stanford, I was assistant professor of economics at Harvard University. In addition, when Donald Turner was chosen to be the head of the Antitrust Division, Mr. Turner asked me to serve as his special economic assistant; and so I served in the Antitrust Division for the academic year, 1965-66, as special economic assistant to Mr. Turner.

In fact, my interest in vertical restrictions stems from this experience. One of the first things that Mr. Turner asked me to do was to look into the question of vertical restrictions, and to examine the

competitive effects of these restrictions.

So my preliminary work in this area was done at the Department of Justice. When I returned to academic pursuits. I continued to work on this subject. Indeed, this article in the Harvard Law Review, in 1968, is the result of my studies, both in the Department of Justice and at the university.

I would like now to begin my prepared statement.

An antitrust appraisal of vertical territorial and customer restrictions rests fundamentally on the question of what are the basic

objectives of Government policy.

Whose interests is antitrust designed to protect? This question is important because, in many circumstances, a conflict exists between the interests of producers and of consumers in our society. Too often, this conflict of interest is overlooked or ignored.

It is argued that we should search for Government policies which

benefit all Americans.

While this approach may be sufficient in some areas, it is not sufficient in all. It is necessary to accept the fact that real differences of interests exist between groups in our society. Actions taken to assist one group may be at the expense of others. While failure to take action has similiar consequences.

Government measures frequently have an important effect on distributions of income and wealth in our society and these effects must be

recognized when judgments are made.

In the realm of antitrust policy, the interests of producers and consumers converge with respect to cost. Both groups have an interest in seeing that goods are produced at minimum possible costs. However, the interests of producers and of consumers diverge in signifi-

cant respects with regard to prices.

High prices lead to high profits, which serve the interests of producers in a number of ways. High profits lead to high returns to the owners of the firm. High profits lead to high salaries and high expense accounts for the managers of the firm. High profits also lead to high wages paid to workers fortunate enough to work for particular firms.

At the same time, however, high profits which are due to high prices also lead to increased costs of living for consumers generally. Low prices, on the other hand, benefit the broad class of consumers and

lead to lower living costs for all members of society.

The point at issue in the case of vertical restrictions, as in many areas of antitrust, is that of monopoly prices. The most important effect of high monopoly prices, I believe, is on the distribution of income between producers and consumers. The objective of promoting competition is associated with that of protecting consumers by restraining firms from setting higher prices than they would otherwise set and from realizing high monopoly returns.

Vertical restrictions represent a business practice which can be examined in terms of its prospective effect on average prices. The important question here is whether vertical territorial or customer restrictions are likely to assist in the attainment of monopoly power

in an industry and contribute to the setting of higher prices.

One point about which there is little disagreement is that vertical restrictions are designed specifically to eliminate intrabrand competition which is, of course, the competition between dealers or bottlers

who sell the same branded product.

Territories are specified precisely to prevent the dealers or bottlers of the single manufacturer from competing with others in the same company. In some circumstances particular classes of customers are specified. In either case, the purpose is to divide the market into segments within which each dealer or bottler has little or no competition in terms of the same branded product.

These restrictions often lead to the creation of monopoly positions

for dealers insofar as they concern particular brands.

The effect of vertical restrictions on intrabrand competition is clearly evident. However, it is often argued that the presence of interbrand competition is sufficient to keep prices at low competitive levels. There is competition among branded products, and, therefore, the loss of intraband competition has little bearing on the final prices charged to consumers.

This position is an important one, and raises some serious issues. First, it suggests that intrabrand competition is strong and effective, and that little more is to be gained from promoting intrabrand

competition.

While this suggestion may be true in some instances, it may not be so in others. Indeed, various factors indicate that the extent of intraband competition is likely to be limited in markets characterized by vertical restrictions.

A second, but related, matter is that vertical restrictions appear to have an important effect on interband as well as on intraband competition.

My primary concern is this second issue. It is to examine the prospective effect of vertical restraints on the degree of competition

among different branded products in the marketplace.

The strength of competition in an industry depends on factors in addition to the number of firms and their relative sizes. It is not sufficient to look only at the number of firms to determine the

degree of competition or the degree of monopoly power.

One of the most important of these additional considerations is the extent to which consumers are willing to substitute among the products of competing firms. When the products of competing firms are highly substitutable, consumers are unwilling to pay more for one product than for another, and individual firms cannot set prices which are higher than those of competing firms without suffering a substantial loss in demand.

Where substitutability is low, on the other hand, demand does not decline significantly even if prices are raised above those charged by their rivals. In the latter circumstances, consumers are sufficiently attracted, for one reason or another, to the products of individual firms so that they continue to purchase them even when their prices

are higher than those of competing products.

An important implication of this form of consumer behavior is that a considerable incentive exists for firms to differentiate their products from those of their rivals. Much is to be gained from influencing consumer behavior in such a way that consumers will not switch from specific brands of a product, even when higher prices are charged.

Where consumer substitutability among competing products is low, products are said to be differentiated; and in these circumstances, firms are inflated to some extent from the effects of the price

competition.

Product differentiation is founded on both real and fancied differences among products. It depends upon the basic nature of the products, as well as on the business policies pursued by the firms. Both advertising and distribution arrangements may have an important influence on the degree of product differentiation.

While product differentiation generally leads to higher prices than would be set in the absence of differentiation, this certainly does not suggest that every instance of differentiation is socially undesirable.

Strong consumer preferences for specific products and the resulting low consumer substitutability often results from real differences among products and from the peculiar skills or attributes of a particular firm.

In these instances, the price effects of product differentiation may

be offset by the social gains associated with product variety.

However, where product differentiation requires the imposition of vertical restraints, our conclusion is different. The need for these restraints suggests that there is insufficient consumer demand for the attributes of differentiation in a free and unrestricted market. Higher prices result, but there are no offsetting factors.

Manufacturers have a clear incentive to adopt policies which maximize the degree of product differentiation. Indeed, this is an important means of achieving the high prices and high profits to which

all firms aspire.

Where products are highly differentiated and substitutability is low, consumers behave as though they are tied to the products of individual firms. In this situation, manufacturers can charge relatively high prices without fear of losing customers.

Since losing customers is the major constraint imposed by a market system on price increases, we should not be surprised if prices are

relatively higher where differentiation is effective.

Whether carried out through integrated facilities or through independent dealers or bottlers, distribution outlets frequently contribute to the achievement of effective product differentiation. The degree of consumer substitutability or product differentiations can often be altered significantly by the commercial policies pursued by a manufacturer's dealers.

For this reason it can be observed that manufacturer-dealer relationships are often founded on factors which create and foster

product differentiation.

Where product differentiation is promoted by conditions of sale at the dealer level—fancier showrooms or additional dealer services, for example—higher gross markups may be associated with a greater volume of sales.

That this effect is likely to be important can be noted from the interest shown by manufacturers that their products sold in attractive surroundings and not in what one executive has called "clap-

board shacks."

Conditions of sale are important to the manufacturer, and this concern follows from his desire to achieve product differentiation. In these circumstances, manufacturers and dealers together benefit from reduced consumer substitutability which leads directly to higher prices being charged for particular branded products.

Because the manufacturer and dealer both benefit—at the expense of the consumer—from the higher dealer markups which are required for product differentiation, a clear motive exists for restricting competition among the dealers or bottlers associated with a single firm.

The manufacturer cannot bear the costs of differentiation and assure an adequate markup simply by lowering his price to his dealers, for price competition among dealers would drive markups down to

their previous levels.

Conditions which protect dealer markups and insure that they are used to create conditions which enhance differentiation become necessary. Furthermore, effective practices are likely to require the active support of the dealer. It may, therefore, be necessary for the manufacturer to protect higher markups in order to provide his dealers with the share of the prospective gains, as well with the resources required for effective product differentiation.

The role of territorial and customer restrictions becomes evident. By fragmenting the market among his dealers with respect to territory or class of customers to be served, the manufacturer protects dealer markups from the eroding effects of intrabrand competition.

Dealers are no longer subject to the competition of others who sell

the same branded products.

In this manner, the effects on competition are similar to those obtained by horizontal price-fixing arrangements. Moreover, vertical

restrictions have economic results which are similar to those fashioned more directly through price fixing via resale price maintenance to insure high margins in the distribution sector of the economy.

To the extent that vertical restrictions are permitted and adopted by the leading firms at the manufacturing stage of an industry, the structure of retail submarkets resembles the national market in

manufacturing.

When the market structure at manufacturing is oligopolistic, local oligopolies are created at the distribution stage. In the end, vertical restrictions not only eliminate intradbrand competition, but also, through their effects on product differentiation, serve to restrict price competition among the products of rival firms.

On both accounts, the presence of vertical restrictions leads to

higher prices paid by consumers for branded products.

Despite the prospect that vertical territorial and customer restrictions have substantial anticompetitive consequences, the extent of appropriate antitrust actions against them depends also on whether there are competitive justifications. For this reason, it is necessary to examine some purported justifications.

It is sometimes argued that vertical restrictions may be necessary to induce prospective dealers to invest capital in buildings and other

fixed equipment.

In the absence of these restrictions, the argument proceeds, the required flow of funds would not be forthcoming, because prospective dealers would fear the strong competition from other dealers would drive margins down and make the investment unprofitable.

Throughout the economy, however, restrictions on competition are not needed to induce capital investment. Real investment in economic activities is generally forthcoming whenever the prospective rate of

return exceeds the cost of additional capital.

So long as the return in an industry is sufficiently high, entrepreneurs recognize that profits can be earned by the investment of funds which are obtained either from internal sources or from the capital markets.

As demand expands in some markets and contracts in others, the return on investment varies accordingly. High returns serve as a signal for the required capital investment, even without restrictive

agreements.

Investment proceeds so long as returns are sufficiently high, but will halt when the additional capital invested in a particular industry drives the profit rate down to the competitive level. Through this process, capital funds are allocated among the various sectors of the

When further investment in distribution facilities is needed by consumers, the normal functioning of the market creates temporarily higher markups, and increased distributor profits. These increased

profits serve as a signal for new investment.

If, however, costs are too high or consumer demand too low, so that distributor profits are not sufficiently high to induce increased investment in distribution, it is likely that society will be better served by greater investment in other areas.

The conclusion which I draw from this discussion is that it is wrong to assume that more dealer investment is always preferable to less. Society may well benefit from increased investment in other sectors

of the economy, rather than in distribution facilities.

Indeed, the need to enforce vertical restrictions to achieve the profit levels required for this investment suggests that a free and unrestricted market would not support the volume of dealer investment desired by the manufacturer.

Consumer demand for the services provided may simply be

insufficient.

When manufacturers assert that vertical restrictions are needed to insure adequate dealer services, they may be correct on their own terms. The word "adequate" may simply describe services which are adequate to insure effective product differentiation.

It is quite possible that vertical restrictions may be needed for markups which are sufficiently large for dealers to provide credit terms, other dealer services or advertising, all of which may lead to

effective product differentiation.

Vertical restrictions encourage dealers to provide customer services jointly with the manufacturers product at a single price. While some of these services may be necessary and useful, the need for vertical restraints to insure their provision indicates only that an insufficient demand for them exists in an unrestricted market.

This practice leads to an effective tying arrangement between services and products, which generally results in the provision of more dealer services than would be obtained if consumers were free to pur-

chase them separately from the manufactured product.

This arrangement, moreover, is likely to lead to a joint price for the product and service, which is higher than the sum of the two prices which would be set were the commodities priced and sold separately.

A system of joint supply contributes to the achievement of effective product differentiation and increased monopoly power at both the

manufacturing and distribution stage of production.

It leads both the higher manufacturer prices and higher dealer markups. Furthermore, it should be evident that the objective of maintaining an effective tying arrangement cannot serve to justify the imposition of vertical restraints.

Another justification offered in defense of vertical restrictions is that they lead to increased sales of the manufacturer's product through

wider coverage of geographic markets.

Since distribution costs to large, nearby consumers are frequently lower than costs to smaller and more distant customers, the manufacturer benefits if a single price is charged to all, and the dealer's savings from sales to one group is used to cover the higher distribution costs of sales to the other.

While this type of distribution arrangement may indeed lead to wider market coverage than could be achieved by overlapping and competing distributorships, it must be supported by some form of

market restriction.

Otherwise, dealer competition for sales to low-cost customers will destroy the single price regime, and will eliminate the high markups which are used, in effect, to subsidize sales to low—to high-cost customers.

What is taking place here is the use of vertical restrictions for the purpose of subsidizing some consumers at the expense of others.

Even if significant cost differences exist among customers there is little economic justification for a set of commercial practices which

insures that all customers are charged the same price.

There is little economic justification for cross-subsidization among classes of consumers. Where sales to specific customers are attractive because they reflect lower costs for distribution, the prices charged to these customers should be lower, and competition among distributors would lead to lower prices.

Where costs of distribution are high, on the other hand, we should expect to find higher prices. At these prices, however, dealers will compete for sales. In either case, markets are all well covered, al-

though possibly not to the same extent.

While market processes, unencumbered by vertical restrictions, will generally have the effect of destroying a single price regime and leading to different prices charged for customers with different costs of distribution, this is not an undesirable result. Indeed, it is well known that competitive market processes lead to higher prices where costs are higher, and lower prices where costs are lower, and this has the desired effect on the allocation of society's resources.

It should be stressed that there is no reason to believe that vertical

restrictions lead to a better allocation of resources.

If a substantial number of customers desired greater market coverage, there would be an expansion of demand for the services of distribution facilities and a corresponding increase in demand for products which are distributed widely. This will give firms with relatively limited market coverage an incentive to increase the number of their distribution outlets.

If sufficient demand exists for their products, firms will achieve the high retail margin needed to make more intensive distribution possible. This is precisely the process through which the market serves to allocate resources to distribution facilities in a socially desirable manner. And it is here also that restrictions on competition through the imposition of vertical restraints are likely to hinder the achievement of desired objectives.

When the relevant market at the manufacturing stage is already an oligopoly, we can expect to find a measure of monopoly power

present, even if vertical restrictions were totally absent.

However, it should be stressed that product differentiation is a further dimension of market structure, which may be as significant to the achievement of monopoly power as is the degree of market concentration.

Moreover, while they comprise only one facet of product differentiation, dealer facilities and services may play an important role. Indeed, the achievement of competitive levels of prices and profits at the manufacturing stage may be significantly frustrated by product differentiation stemming from practices at the dealer stage.

In the distribution sector, vertical restraints lead directly to higher markups than would otherwise exist. Although these markups may result in higher distributor profits, they are also likely to be associated

with inflated dealer costs.

Fancier showrooms or more elaborate facilities are constructed, and more dealer services are provided that would be demanded by con-

sumers in an unrestricted market. This conclusion follows from the need for vertical restraints to assure these showrooms or services.

The major line of defense for vertical territorial and customer restrictions lies in the prospect that interbrand competition might be

fostered through the suppression of intrabrand competition.

However, vertical restraints may lead instead to increased levels of product differentiation and, therefore, to the achievement of increased monopoly power. As a result, vertical restraints are likely to impede the growth of price competition and the movement of prices toward costs.

While some measure of product differentiation may be desirable, even though price competition is lessened, the attainment of differentiation is certainly not a valid reason for rejecting the normal presumption of antitrust policy in favor of maximum competitive behavior on the part of independent firms.

This is especially so since traditional antitrust objectives, in terms of protecting the interests of consumers, are more likely to be se-

cured through the promotion of price competition.

A concern with protecting the interests of consumers leads to the view that vertical territorial and customer restrictions should be prohibited under the antitrust laws.

Even in the case of a small manufacturing firm facing a giant rival in an oligopolistic market, these restrictions are undesirable.

We are concerned here with competition as a process for achieving social objectives, and not merely with the number of competitors in the market. Moreover, there is not much to be gained from bolstering a small and perhaps inefficient rival when this can be accomplished only by market restrictions which sacrifice primary objectives. Even in these circumstances, vertical restrictions should not be permitted.

This analysis leads to the conclusion that vertical territorial and customer restrictions should not be exempted from the antitrust

laws.

Furthermore, it seems evident that the qualifications included in S. 3587 are fully insufficient to meet the needs of consumers. The fact that there is more than one trademarked product in a market does not indicate that the degree of interbrand competition is likely to be sufficient to keep prices at low competitive levels.

In the first place, these qualifications are consistent with the presence of high degrees of market concentration, and it is well known in economics that high levels of monopoly power are often achieved in markets where there are two or three or a small number of rival

firms.

Second, there is the fact that product differentiation is an equally important determinant of the degree of competition. Where product differentiation is significant, due perhaps to real differences among products, individual consumers have strong preferences for the products of a single manufacturer.

In these circumstances, the only prospects for competition is intrabrand competition, and it is this competition which is specifically

proscribed by the presence of vertical restraints.

Furthermore, there is considerable likelihood that the presence of vertical restraints contributes to the degree of product differentiation.

This result has the direct effect of reducing the degree of competition

at the manufacturing stage.

Rather than leading to increased competition at the manufacturing stage, the tolerance of vertical restraints has the opposite effect: vertical restraints lead instead to reduced competition.

Moreover, vertical restraints have the directed effect of restricting competition among dealers of the same manufacturer. On both ac-

counts, consumers are likely to pay higher prices.

A policy designed to protect the interests of consumers by promoting the maximum degree of competition should prohibit vertical territorial and customer restrictions. As such, the passage of S. 3587 would be a significant step backward in the creation and enforcement of an effective antitrust policy in the United States.

Senator Hart. Thank you, Professor.

I am required again to interrupt to go for a vote, and I would intend, when we resume, to ask if Professor Preston would react to Professor Comanor's statement, and perhaps that will show an effort to balance the time, as well as gain information.

(Whereupon, a brief recess was taken.)

Senator HART. Now, we'll be in order; and, Dr. Preston, do you

want to react to the testimony?

Dr. Preston. Yes, I am happy to, Senator. There is a little problem in the interaction here, since Professor Comanor has really not had an opportunity to give as much study to the soft drink aspect of this issue as I have been able to, and so it is difficult to have an exchange about some of the specifics.

But, in general, I would say that there are two points that I feel Professor Comanor neglects, or I don't know how he would relate

them to our particular situation.

One is the interrelatedness of demands from various sources for soft drinks; that is, the take-home market, the restaurant market, the various types of packages, the small outlets, the large outlets, and so forth.

Professor Comanor made a kind of general point that every customer should pay his own freight, and that, of course, is a perfectly valid viewpoint. But that does assume that the markets are divided: that there are different classes of customers in some sense, each of

whom should pay his own freight.

If, in fact, there is a big group of customers who interact in the various outlets, and if the availability of the product in one outlet leads to their purchase of it in another outlet, another time, another place, then that is a fact of interrelated demand. That is, the interrelated demand between the various types of outlets and types of uses.

Now, it is a fact. Now, it is true that we could imagine an industry reorganized in a way that made that not possible at all. Like, for example, having supermarkets have only supermarket brand soft drinks, and other brands of soft drinks be available elsewhere, and separate the different parts of the market, and then that fact would go away.

That is not the way the industry has grown up. I don't see anything intrinsically more desirable in one form or the other of running the soft drink industry. In fact, it seems to me the way it is going, you

know, is not all that bad.

Therefore, we face the fact of these interrelated demands. And it is particularly this fact that leads the bottlers and the franchise companies to want this market coverage, to want the large and small outlets, all outlets in the various kinds of packages and sizes and so forth.

Now, if we face that fact, then uniform pricing throughout the market, or at least some kind of relationship among the prices, and broad market coverage becomes a desirable motivation for both the

franchise company and the bottler.

And it seems to me they will be impelled to seek that kind of coverage and I don't see a general social harm in it, you see, that would require that to be destroyed so that some other kind of mechanism could

be put in its place.

The other fact that is important, in my view, is that we are talking here about differentiated products. We can tell the difference in their tastes, and not only that, but because of the history of brand distribution in these industries, the established brands are recognized in the

consumer mind as differentiated products.

Now, it is not clear to me at all that the territorial franchise system contributes to the existence of product differentiation in this industry. Now, Professor Comanor's analysis is very much oriented towards the notion that the franchise system contributes to product differentiation, and product differentiation leads to monopolic power, and monopolic prices.

But if we break the first step of that argument, and say, "But the franchise system doesn't lead to product differentiation, doesn't change the product differentiation, it's already there." It's a fact. As of 1972, it's a fact. Then there is nothing else there in the argument, you see.

We break the thread and it doesn't follow.

So I would like to ask, to the extent that he might be willing to respond, and I realize that this is a little bit of an unfair question since he has not had an opportunity to consider the industry in any detail, in what way the franchise system contributes to product differentiation; that is, to there being more of a product differentiation than there would be if it were gone.

And then, following that step, how the product differentiation that is due to the franchise system leads to—let's say monopoly prices, be-

cause he used the term "monopoly prices."

Senator HART. Did you want to react to that?

Dr. Comanor. Yes, I would like very much to react to that, but also I would like then to go on and make some comments about Professor Preston's statement.

I think the question of differentiated product is, indeed, very important here. It is true, of course, that this is a product area in which there are differentiated products regardless of the effect of franchising, re-

gardless of distribution arrangement.

At the same time, I think that you cannot simply say that differentiation is a fact. It implies that either you have or have not product differentiation. Indeed, differentiation like most things in economics is really a matter of degree. It is a question of the price differential required to induce consumers to switch from one product to another. The question we need to ask is not whether there is or is not differentiation,

but rather, in what ways may vertical restrictions contribute to product differentiation, to a greater degree of product differentiation.

And, indeed, it seems to me there are a couple of ways in which ter-

ritorial restrictions has this effect.

First, products taste different. That is certainly true. At the same time, it is well recognized that advertising and promotion by firms have a further effect on differentiation. That is recognized by most economists, and I think Professor Preston would agree.

Let's ask the question, then, how do territorial restrictions influence the volume of advertising and promotion? I was told earlier today that approximately 20 to 30 percent of soft drink advertising is car-

ried out by the bottlers as opposed to manufacturers.

Surely, the ability of bottlers or distributors to spend money on advertising is very much associated with their having protected market positions. This protection leads to their having resources available for these purposes, which would not be available if prices were lower as a result of some degree of price competition.

Second, it's my understanding that bottlers have major responsibility for point-of-purchase promotion. While I do not know the numbers

involved, this is my understanding of the industry.

Certainly, all the costs of point-of-purchase promotion must be paid for in some way. If the distribution segment of the industry were fully competitive, there would be much fewer funds available for these sorts of activities.

So it is that the imposition of vertical restraints, through its protection of dealer or bottler mark-ups, provides at least a part of the

resources to expand the degree of product differentiation.

But I would like now to turn my attention to Professor Preston's analysis. I want to comment on what seem to me to be the two critical points in his testimony.

First, there is the question of the effects of vertical restrictions on the

prices charged to consumers.

Second, there is the question of market coverage. It is my understanding that Professor Preston places major reliance on the idea that vertical restrictions lead to increased market coverage. This effect is a large part of the argument contained in his paper on this subject. I have read his paper in some detail and I do not dispute this conclusion. He presents an interesting model, and given its assumptions, which you may wish to question, his conclusions follow.

But I would like to direct your attention to one sentence in his paper, which is on page 517 of his original paper. He proposes an economic model by which to describe the effect of territorial restrictions on market coverage. And he comes to the conclusion restrictions

may lead to an increase in market coverage.

But then he has a further sentence, which I think is terribly important for the question we are studying here today. He says, and I quote.

Whether the establishment of additional distributorships results in an overcommitment of resources to distributive activity in the economy . . . is a question which we do not investigate here.

He explicitly states that he does not deal with the issue of whether more market coverage represents as preferable allocation of resources.

As I understand it, his argument is the more coverage, the better. This may be true from the point of view of the manufacturer. However, if you are looking at the issue from the point of view of the efficient allocation of resources, an allocation of resources which is based on consumer preferences, it seems to me that we cannot base policy decisions on the view that the more coverage, the better. Rather resources in this area as in others should be allocated according to consumer preferences as registered in free and unrestricted markets.

The increased market coverage, and the cost of increased market coverage, may simply not be desired by consumers. In my view, the test of the free market should be used to determine resource allocations. Indeed, Professor Preston's conclusion may be right on its own terms, but the qualification which he makes to his results seems to me to be terribly important.

The second important issue that he deals with is the question of price effects, and the question of what effect will the elimination of vertical

restrictions have on prices set in the marketplace!

This is a question on which, unfortunately, I have not done any research as concerned with this particular industry. This is a question which requires statistical analysis of a sort which I have not carried out.

However, today I have heard two estimates of this price effect. First, the number which Professor Preston gave me. Professor Preston admits that the elimination of vertical restrictions will lead to lower prices charged, to lower wholesale prices. He suggests that there might be a price effect on the order of 4 percent in half the market for soft drinks. This amounts to a figure on the order of 3100 million. Now, a hundred million dollars in lower prices on soft drinks alone seems to me to be a large amount of moncy, assuming he is correct.

He suggests that this saving may not be passed on to consumers. I think that is a very strange conclusion. When we teach our students about competitive industries, we say that lower costs do generally lead

to lower prices.

And one of our textbook examples of a highly competitive industry is retail trade. If there is any industry in which lower costs, in the form of lower wholesale prices, would be passed on to consumers, retail trade is certainly one of them. While perhaps not the entire \$100 million, will be passed on, my understanding of the structure of competition in retail trade indicates that most of it will be passed on to consumers.

But Professor Preston's number is a low number that I have heard this morning. There is a high number, too. The Federal Trade Commission number, which was reported again in earlier testimony today, suggests that prices might decline by 20 percent of the total soft drink market, or \$1.5 billion.

Dr. Preston suggests that he has seen no evidence to support that estimate. I don't know what he has seen. I, admittedly, have not looked at this number, and I have seen no evidence to support it or refute it.

So it seems to me that one way of thinking about this is to take these two bounds. We have an estimated price effect of 4 percent in half the market or \$100 million. We have another estimated price effect of 30 percent of the entire market, or \$1.5 billion. I don't know what the truth is. My guess is that it probably lies somewhere between these two numbers. To determine the correct number would be a very difficult task.

But even price effects on the order of \$100 million seem to me to be sufficiently important so that if we are concerned with protecting the interests of consumers, there is no place for vertical restrictions.

Senator Hart. Professor Preston?

Dr. Preston. The debate goes on. I have taken the items in reverse order, if we are going to put in numbers selected wherever they are to be found, we must also include Mr. Rainwater's number which, according to the press release, says that increases of prices of more than \$1 billion will occur in the soft drink industry if the present sales territories are struck down.

Now, without presenting any detailed analysis of that, that might give us another bound. So that now we have a billion up and a billion

down.

With respect to the percent, of course we don't have any effects to talk about here at all if there are no wholesale price reductions by any bottler to any large buyer. Then there won't be any effects. There have to be some price cuts somewhere to get the bottlers, the large bottlers to expand, or any bottlers that do expand, to expand and take over other people's operations, unless the other firms just simply close up and go out of business through fright.

So that, if in that sense, that in my paper I say we must anticipate some price reductions at wholesale level to start any analysis here at all. I do seriously doubt both the amount of the reductions and the

extent to which they would be passed on.

Contrary to Dr. Comanor's remarks about competition in retailing, although I agree that retail trade, as a whole, seems to be a competitive field, within the supermarket we must remember the supermarket is a monopolist of everything that's sold within that supermarket.

And the strategy for supermarket pricing is to develop a mix of prices and markups from high to low such that profits and sales are maximized. And any inspection of supermarket prices will reveal a tremendous range of price-retail price, wholesale price relationships from equal to many multiples, the retail price being higher.

So I really think that the net effect on consumers is very, very difficult to predict, and any of these numbers that we might talk about, even the small ones, are very iffy, particularly when we follow through to the increased concentrations in bottling, in the franchise companies, and in the control of the retail supermarkets, themselves, over the branded soft drinks.

When you have the increased concentrations, as Professor Comanor was quoting me back to myself, so if you will forgive me. I will quote myself back to him, one of the findings, which we generally agree, uniformly agree on, I think, is the tendency of increased concentrations

to lead to higher prices, markups, and profits.

Now, there is no question but that the pattern of structural change that would be touched off in this industry by the elimination of the territorial franchise system would be a pattern of increased concentrations. The Federal Trade Commission acknowledges it. I certainly think it's the case, and I don't think Professor Comanor means to challenge it.

When we have that effect to consider, then we really do not know what the net, long term price effects will be. So I guess that's my strongest point. I do feel that Professor Comanor didn't answer my first question about the logic of his argument since he went to the monopoly prices and said, because there are monopoly prices, there is too much spent on advertising and, therefore, increase product differentiations due to the territorial franchises. But the argument that he presented in his paper runs the other way.

It says territorial franchises, product differentiations, monopoly prices. I want to see the logic of that argument. I am not arguing that advertising is not a dimension of product differentiation. We both

agree that it is.

Mr. Chumbris. Mr. Chairman, for clarification of the record, as I recall it, the FTC said yesterday it was \$100 million savings, and I spoke to Mr. Ward about that. On page 13, he said that if the average price falls as much as 5 percent, which is not unrealistic, consumer savings could reach \$250 billion per year, not \$1½ billion that you just mentioned.

Dr. Comanor. I took the number from Senator Harris today.

Mr. Chumbris. Senator Harris is not the Federal Trade Commission. You are quoting Federal Trade Commission.

Dr. Comanor. I apologize. I took the number from Senator Harris'

testimony which quoted the Federal Trade Commission.

Mr. Chumbris. I questioned Mr. Ward on that, and I said, "Now, Mr. Ward, you have used \$100 million," and I said, "We have heard a big figure used many times before the subcommittee, but there is always another side of the coin, that you have to take into consideration, even assuming that \$100 million is that figure," because if you knock these bottlers out of these smaller areas and knock them out completely, you are losing a plant; you are losing salaries; you are losing taxes; losing one plant, as I understand, for every business brings in 30 or 40—30 people, according to Chambers of Commerce.

If you lose a Pepsi bottling plant in that territory, you might lose a Coca-Cola bottling plant in that territory. You might lose six others. Besides that, you might lose a chain store. It has a chain reaction. And so, if you look at the other side of the coin, that \$100 million—assuming that that's the correct figure—that might be a saving to the consumer, the consumer is going to lose a lot more in this overall

drought that goes to the economy of that particular town.

And I think we ought to take that into consideration.

Senator Harr. I have a hunch that both of our witnesses, in the course of exchanges, will make sure that further rebuttal that they have in mind will be fed into answers, whether the question draws it out or not.

I suggest that Dr. Andersen start.

Dr. Andersen. Did you want to comment or——

Senator Harr. I was suggesting that at some point we ought to turn it over to you, and I acknowledge that whether we elicit any comment on the record or not from the witness, that we are going to get it anyway. So please start.

Dr. Comanor. I am afraid that is true because I would like to rebut

some comments of Professor Preston.

Dr. Andersen. OK. I did want to ask something about this question of concentration. There seems to be clearly a situation where technical change in marketing characteristics are generating considerable pressures for some form of consolidations as we look at the industry, and

whether the bill passes or not, I think realistically we can expect

some substantial changes through time.

But one of the things that bothers me about concentration increasing or whether it increases or not, has to do with what role vertical restraints, exclusive territories has on interpreting the concentration issue.

For instance, in both Mr. Kintner's paper and Mr. Rainwater, it referred to the Cresap study, where they say something like 50 largest firms have 38 percent of soft drink sales compared to 50 largest

in canned foods and fruits and vegetables.

And I just wonder what significance that kind of a comparison has. To me, it doesn't necessarily have much significance because one involves a situation where you have the 50 largest firms operating in a context of territorial restraints.

As far as how they interact in market, and the other, you don't necessarily have such restraints. Is that a relevant consideration as far

as you-

Dr. Preston. It's a consideration in any regional industry regardless of the presence or absence of the territorial franchise system. Any industry that is primarily in the hands of regional firms, of course, has to be studied on the regional basis, and there is no doubt about that.

However, I would note that on many of the other items that have been circulating around in this whole collection of materials from the FTC, in particular, have stressed data about the role of large bottlers or the position of large bottlers, or something like that, and added up the totals of large bottlers as if they constituted something.

Now, your remark, as I get it, is that they don't constitute anything

in a competitive market since different-

Dr. Andersen. Those particular sets of numbers are not-

Dr. Preston. Since different bottlers are operating different markets, I think that's one of the very interesting aspects of the industry. That's the point I was trying to draw your attention to in suggesting a superimposition of the merits, that not only do we find that different numbers of bottlers, and different bottlers are operating in different specific market areas, that we also find that the same bottlers are operating somewhat in overlapping and somewhat in different areas.

So that one—let's just put it in some words here—one Pepsi bottler may have two or three Coke bottlers that he is involved in competition with. One of those Coke bottlers may also be involved with two differ-

ent 7-Up bottlers, let's say, and so forth and so forth.

The interaction of the territories seems to me a competitive aspect of the thing. That is, I would find the territorial question a little different if all the territories were exactly the same, whatever they were, State or county, or SMSA, or whatever. The fact is, they are not the same.

And, because they are not the same, a price change, let's say, for a firm in one part of the territory—let's imagine a case where we have a Pepsi bottler and two different Coke bottlers, just to give us an example, all right, within the same territory; one large territory for Pepsi, two smaller territories for Coke.

Now, let's suppose one of the Coke bottlers does something. He offers

a special or what-not.

Now, the Pepsi bottler, in his response to that, may well do something that affects his behavior throughout the market, because he doesn't

acknowledge the two different Coke territories. They are not two different territories to him. He has got one big territory.

Dr. Andersen. Doesn't that assume-

Dr. Preston. If I could just finish. My point is, his response may well be territorywide for himself, which involves a response of any other Coke bottlers' territory, too. And, thereby, what happened in the first Coke territory is transmitted in some way into what happens in the second territory. And this is not fanciful. This is simply not fanciful. It is simply true.

Dr. Andersen. The way I react to it is that there is a certain assumption about the intensity of interbrand competition in that regard, and I for one am concerned about the degree to which there may be differentiation. And if the differentiation is significant, whether we have to

worry about intrabrand issue, period.

Dr. Comanor. Your original question concerned the notion of concentration, the effects of concentration. One point should be emphasized. Concentration ratios describe prospective economic effects only insofar as they refer to relevant economic markets. Otherwise, they have little meaning wih regard to economic activity.

If the relevant market is in one geographic location, and concentration figures are based on a different area, these figures now may be meaningless. It is not surprising that antitrust cases frequently revolve around the question of what are the appropriate boundaries of an

economic market?

Note the following: If there is one economic market, because transportation costs are low or for any other reason, and vertical restrictions divide that market into two, the elimination of vertical restrictions divide that market into two, the elimination of vertical restrictions divide that market into two, the elimination of vertical restrictions divide that market into two, the elimination of vertical restrictions divide that market into two, the elimination of vertical restrictions divide that market into two two divides the context of the context of

tions will lead to reduced concentration.

It is important to note that the concept of concentration applies to a market area. If the territorial boundaries contained in vertical territorial restriction, divide a relevant market area, a consumer in one part of the market area cannot buy from a seller in the other. Where there were single firm monopolies in two artificial markets with territorial restrictions, the elimination of these restrictions will lead to a market

situation where there are two competing firms.

Where markets are bisected by artificial territorial divisions, the elimination of these divisions will lead to a decline in effective concentration, a reduction in concentration. There may be other cases in which market boundaries lie along the same lines as economic boundaries. In those areas, the climination of vertical restraints may have very little effect. But, surely, whenever we are talking about territorial boundaries which divide true economic markets, the elimination of vertical territorial restrictions will lead to a reduction in concentration.

It is the competitive effect associated with a reduction in concentration which would lead to lower prices with the elimination of terri-

torial restrictions.

Now, let me try to say something about in reply to Professor Preston's recent comments, if I may. The first has to do with competition—

Mr. Chumbris. We are getting away from the point. Let's get this point set up while we are at it. I have some questions, and I know Dr. Preston was ready to answer you on that.

Senator Herr. Why don't we—rather than fighting the inevitable—there is another vote. Why don't I get over and see if I can get to cast

my vote.

(Whereupon, a brief recess was taken.)

Senator Hart. We will be in order. Dr. Andersen?

Dr. Andersen. I am trying to figure out which court the ball is in. Early in your statement, Dr. Preston, you discussed the importance of distinguishing, among bottlers, or bottler situations, and there are a number of things you pointed to that were relevant, whether they were owned or operated by franchise companies or whether they account for a great bulk of total activity in an industry; whether it's small bottlers or big bottlers, and so on. And one of the things that concerned us here, I suppose, is that with the passage of, say, this piece of legislation, it might rule out any sort of action on the part of the antitrust agencies.

Now, before we go to discuss whether or not it might rule out, the more important thing is, in what way do we distinguish, and why should we distinguish? Now, for instance, it's possible for us to say in a general way that you have, say, a Coke bottler, that is the exclusive supplier of, we will say, New York City, and Puerto Rico, combined. That's a true situation, and as a publicly owned company, independent in terms of ownership as far as U.S.A. Coke, then you have, say, San

Francisco Coke operation, which is owned by Coke.

And then we have Mr. Foster's operation in Los Angeles. And these are distinguishable in certain important ways, it would seem. Would you want to discuss whether they are, or how he would want

to distinguish them, and why?

Dr. Preston. I don't think I want to say that I could predict the behavior of each kind of bottler under all kinds of imaginable market conditions. My point was that the behavior would probably vary among different kinds of bottlers as you described them there, and I think it would be a mistake to assume that any change one could imagine would affect all of them alike.

I was trying to draw attention to the diversity of the actors in the play, if you will, and the fact that whatever happened on the stage.

different actors might respond in different ways.

So that I don't think one set of predictions would apply to all. I am afraid I am not being responsive, but if you pose me a more concrete question, maybe I could be more responsive.

Dr. Andersen. Well, I guess we will be more direct. You say there are distinctions that should be made, and you list a variety of ways.

Now, why would you want to make the distinction?

Dr. Preston. For the reason I just suggested, that I think different firms would respond in different ways to various developments that might be thought about, that might be of interest.

Dr. Andersen. Would you then take these sort of as indicia to the

intensity of competition or lack of it?

Dr. Preston. In their resources, the opportunities, and everything

else.

Dr. Andersen. Early on, you mentioned the question of concentration, and your concern about concentration. We don't have much in the way of data on many markets, but there are a number of SMSA's where there are some concentration figures, and they average between 60 and 80 percent. Is this an area where you would be concerned?

Dr. Preston. Well——

Dr. Andersen. If exclusive territories were applied?

Dr. Preston. Before the last break we took, we had a colloquy about concentration, and I had started to say something then, and then we

took a break and we sort of discussed it privately, and did not go on about it.

I don't know how the concentration was measured since we have just agreed in our earlier discussion. I think, that because of the various sizes and structures of the territories, as a rule, no one territory is like another territory, and therefore, some of the firms will be operating in

a particular area, and some will not.

Now, if you have SMSA's that are all within, let's say, the territory of all the firms being considered in the measurement of concentration, then the concentration measurement might really measure concentration in the territory. I don't know whether that's true or not, because I don't know the territorial boundaries within which concentration is measured or the ones of the bottlers, for that matter.

Dr. Andersen. There is another vote, so I will just ask one more question, and then we will wrap it up. If this bill were, in fact, to foreclose any action; as far as antitrust agencies were concerned, with regards to exclusive territories, would you be concerned with its passage?

Dr. Preston. Well, as you posed the situation contrary to the facts as I understand it, I don't see that the proposed bill forecloses anything. It seems to me that the proposed bill has the intent and, indeed, the content, to the best of my ability to read it, of saying that the investigation of the economic effects of territorial franchises has to be carried out on its merits, and to see what the effects are in particular circumstances. If the effects are undesirable, then they are fair game. If there are no undesirable effects, then there is nothing to do further.

And if there are industry problems that are due to some other factor, and not due to these agreements at all, then the agreements themselves, or the arrangements themselves, the system might continue

while other changes took place.

I do not see the legislation proposed here as exempting territorial franchises from the antitrust laws. I think that is a misreading. I hope—I won't say a misrepresentation, but I think it's a misreading. That is not the way I understand it.

Mr. Chumbris. In other words, there is no immunity there at all. Dr. Preston. I don't see immunity at all. I do not read the proposed legislation as conveying immunity at all. I see it as favoring a case-by-case analysis, which is the—was the decision of the majority of the

legislation as conveying immunity at all. I see it as favoring a case-by-case analysis, which is the—was the decision of the majority of the Supreme Court in the White Motor case and it seems to me that was a sound approach then, and continues to be a sound approach today.

Mr. Chympers, I think Dr. Preston aught to be given the privilege

Mr. Chumbris. I think Dr. Preston ought to be given the privilege by the chairman to submit his statement for clarification of the record, if there is any misunderstanding on that point.

Anyone who wishes to read what it says has the privilege.

Senator HART. I would suggest that, there being another vote, that we permit Professor Comanor and Professor Preston to file any supplemental comment they might like to have appear in the record, and if staff on either side have questions they would like to direct to either or both, that also can be done, and that will be made part of the record.

There is no problem at the moment of the record being foreclosed because we have scheduled additional hearings for the 12th, 13th, and 14th of September, and Mr. Kintner and Mr. Strachan may, if they desire, submit for the record, a statement for clarification purposes, specifically on the antitrust. Clearly, we ought to make it possible to obtain from the Justice Department and the Federal Trade Commis-

sion, their reading of the bills with respect to this last point; whether it is or isn't immunity from antitrust as a result of these proposals.

And I want to thank the staff for the care in developing the hearings

thus far and I appreciate everyone's cooperation.

Just as an indication of how the system works, the bill on which the series of amendments has been offered is the bill to extend the life of the United States Eicentennial Commission in order that we celebrate

appropriately our 200ch anniversary.

The amendments have been reasonably related until this last one, which we are now about to vote on—If my information from the phone is correct, we are going to add to the Bicentennial Commission a prohibition against school busing. I don't know what that proves about the progress that we are making in our national life.

We will adjourn, to resume September 12.

(Whereupon, the hearing was adjourned at 3:25 p.m.)

STATE University of New York at Buffalo, August 15, 1972.

Senator Philip A. HART,

Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Sergie, Washington, D.C.

Dear Senator Hart: Ifaving had time to reflect a little on the joint appearance of Professor Comanor and myself before your Committee on Thursday, August 10, I should like to take advantage of your invitation to offer one final comment

for the record.

The difference of opinion between Professor Comanor and myself apparently comes down to this: Without reference to any particular industry or existing ret of economic circumstances. Professor Comanor emphasizes the importance of disearch ging business practices that may inait in any way the scope of price competition. I fully share his anthusiasm for price competition. At the same time, I would also emphasize the importance of product variety and market coverage, both as aspects of competition and as factors contributing to consumer welfare. I also feel—although I cannot prove it mathematically—that the competitive development of our economic system over time is promoted by the existence of a variety of business units—firms differing in size, function, and managerial character—rather than by either uniformity (among several firms) or monopoly. Without being an ardent small business protectionist, I confess to a preference for diversity and diffused managerial authority, as against standardization and centralization, wherever possible throughout the economy.

With particular respect to the soft drink industry, I remain impressed with the varied dimensions of competition and consumer choice (including a wide range of price choice) available in the marketplace. I am convinced that the elimination of territorial franchises would result in substantially increased concentration and vertical integration, and hence increased entry barriers, in this industry, with little prospect of leng-term gains for consumers. I doubt seriously that reorganization of the industry through complex regulatory innovations would prove operationally feasible and that the results of such a program, even if it could be implemented, would be worth the cost. In short, I feel that the case against the territorial franchise system—either in soft drinks or in general—is,

as vet, unsubstantiated.

These latter remarks relate more to the merit of the current FTC proceeding than to the legislation before your Committee. However, the issue before you as I understand it—is whether the current pattern of market organization will be examined on its merits, or simply swept away on the basis of a per se interpretation of prior legislation and court decisions. I would hope that the serious and courteous attention that your Committee has devoted to this issue would stimulate the antitrust agencies to undertake a comprehensive and unbiased analysis of the economic effects of established business practices in any industry, before serious consideration is given to attacking them on per se grounds. It is my understanding that the legislation before you is intended to require just this sort of substantive investigation, and I continue to support it on that basis.

Sincerely,

# EXCLUSIVE TERRITORIAL ALLOCATION LEGISLATION

## TUESDAY, SEPTEMBER 12, 1972

U.S. SENATE. SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE COMMITTEE ON THE JUDICIARY, Washington, D.C.

The Subcommittee on Antitrust and Monopoly convened in room 2228, New Senate Office Building, at 10:05 a.m., Hon. Roman Hruska presiding.

Present: Roman Hruska.

Staff present: Charles E. Bangert, general counsel; Peter N. Chumbris, chief minority counsel; Charles E. Kern, II, counsel, Patricia Baro, editorial director, and Janice Williams, clerk.

Senator Hruska. The subcommittee on Antitrust and Monopoly will come to order. The chairman, the senior Senator from Michigan, has been unavoidably detained. He has asked this Senator to preside in his place.

The first witness we will call on this resumption of hearings on S. 3133, a measure which would legalize exclusive sales territories for soft drink bottlers and food distributors of certain classes, is, Fred G. H. Meijer, of Meijer, Inc., Grand Rapids, Mich.

Will you come forward, please, and take your place at the witness

table here?

Mr. Meijer, Senator Hart extended his apologies to you for not being able to be here. I express them now at this time. He no doubt will contact you personally at a later time. He did want to introduce you, but until he does come, we will proceed with your testimony.

Copies of your statement have been furnished to the committee. You may proceed in your own way, either to read the statement or to highlight it. It will be placed in the record in full in any event.

(Document follows, Testimony resumes on p. 463.)

## STATEMENT OF FRED G. H. MEIJER, MEIJER, INC., GRAND RAPIDS, MICH.

GENTLEMEN: It is a pleasure to appear here today because we at Meijer believe that the retailer is the primary party the consumer can appeal to in their efforts to stretch their food dollars. We believe this is a challenge to us as retailers to put forth maximum efforts to control our costs of doing business, thereby con-

The retail food industry is in a very difficult position. While our customers are appealing to us to hold the line on prices, our costs of the items we sell and our costs of doing business continue to increase. This would not be so difficult a task for our industry if we were operating on reasonable profit margins. However, the financial reports of the supermarket companies have not been showing me any margin for absorption of these increased costs. In fact, drastic measures are being taken by some of the major companies to survive.

In addition to this customer pressure and lack of profitability, the government has challenged us to hold down cost increases to help stem inflation. In May of this year, Vice President Agnew challenged a group of industry executives at a Super Market Institute meeting to hold the retail price line.

Last week Thursday, we received a telegram from Donald Rumsfeld reminding us that some beef market prices had been reduced and the government wanted this reduction reflected in the retails promptly. He gave no room for those operators who already are losing money in meats due to competitive pressures.

We are doing everything we can think of to comply with the customer requests and the government demands. This has included the sending of letters to suppliers asking them to do their best to avoid higher prices. We have published the names of suppliers who have raised their prices and those who have lowered

Price Commission Chairman Grayson was kind enough to send us a letter

recognizing our efforts in this regard.

Yet, while we have done all this, we still face the ultimate question of how to raise productivity as this is one of the few ways of truly and effectively con-

trolling costs.

We firmly believe that new methods of production and distribution can and must be adopted. I am speaking specifically of the current system of distribution of carbonated beverages, a system that has been proven uneconomical in many other food lines, and a system that should now be discarded to make way for the new, more efficient methods of product distribution.

Years ago many of the national brands of foods were distributed by the manufacturer to each retail outlet. I'm referring to such well-known companies as Kraft Foods, H. J. Heinz, etc. These major firms discontinued this costly distribution method many years ago and went to central distribution by co-op

and corporate warehouses such as we have at Meijer.

This discontinuance of manufacturer distribution to stores has progressed at a rapidly accelerating pace until today there are very few grocery items delivered to the stores by manufacturers or jobbers other than perishables, such as bread and milk, and the subject at hand, soft drinks. In fact, at Meijer, even though we do not have our own bakery or dairy, we still ship approximately 75% of all groceries from our Distribution Center. If we operated our own bakery and dairy, that 75% figure would be substantially larger.

Why this rapid transition from store door deliveries by manufacturers and

jobbers to central distribution? Economics!

Economics thru: (1) more efficient distribution methods (2) opportunity to buy at lowest cost

(3) increased competition among suppliers

Our experience has proven that central distribution reduces costs by: (1) large bulk shipments from supplier to the warehouse with the product then going to the stores on large semi-trailers.

(2) more efficient handling with increased use of fork trucks, cargo carts, etc.

at store level.

(3) increased use of computer ordering and reordering from store to corporate

office and office to suppliers.

(4) reduced store-door deliveries which would drastically cut costs thru reduced receiving labor, receiving errors, and the ever-present problem of security control.

(5) While store door deliveries are made, many trucks are sitting in store lots. Warehouse semis arrive, unload their entire load of perhaps 1500 cases, and can

be back on the road in 45 minutes.

(6) only one driver is needed to distribute full semi-trailers to a store instead

of a driver for each jobber.

The opportunity to buy better has been proven many times, as the gentleman from California so graphically outlined in his example of buying in Denver and shipping to the Coast and still saving substantial numbers of dollars.

In our immediate area, we currently purchase some major brand soft drinks from distributors who have restricted areas. As a result, one particular major soft drink must be purchased from seven different firms to service 23 Meijer outlets, and we purchase the product at three different prices on one package and four different prices on another package.

In this particular situation, the high price is 12% higher per case than the low price on one type of retail package; and on another retail package, eight pack returnables, the high price is 25% higher than the low price. We know we could distribute this product for a small fraction of the 12% and 25% price

spread and pass the savings on to the consumer.

If it weren't for the territorial limitations, we could take advantage of these buying opportunities and save the consumer money. This type of freedom of purchase would create added competitiveness in the industry which should bring about new efficiencies thereby reducing costs still further.

It may be argued that central distribution of soft drinks would adversely affect some of the bottlers, but is that argument valid? With the removal of territorial restrictions, perhaps the smaller, aggressive bottler would fine his niche to build on, while the larger ones continue to succeed. I firmly believe that whenever possible the government should not promulgate laws that may protect inefficient processes or distribution systems as the bills being discussed would do.

It may also be argued that central distribution would hurt the movement of

returnable bottles and this, then, is an unsound move ecologically.

Gentlemen, I believe this argument is also without merit for two reasons:

(1) many warehouses now carry one-way bottles only because they are not

able to acquire the popular brands of returnables.

(2) Meijer stores are currently handling a large percentage of soft drinks in the returnable bottles. If all products were in returnables, we might have an impossible situation. What is needed is a total systems approach of the sale of returnables and the reclaiming of one-ways.

An example of this approach is our dedication to recycling as evidenced in these photographs showing the large bottle recycling stations on our parking

lots and the cardboard balers in our stores.

We are currently collecting in excess of 350 tons of recyclable glass per month,

and we are recycling in excess of 600 tons of cardboard per month.

I would like to re-state that I believe central distribution of soft drinks, attainable through the elimination of territorial boundaries, will reduce costs and save the consumer many dollars thru:

(1) more efficient distribution methods

(2) opportunity for retailers to buy at lowest cost(3) increased competitiveness in the industry

We, as retailers, must be ever alert to find better ways to get the product to

the consumer at the lowest cost possible.

In our company, we have adopted new shelf-stocking methods to save labor costs. In so doing, many products are stocked with some of their labels upside down. Our shelves don't look as tidy because more cardboard shows, but the method helps control our cost of doing business.

In conclusion, we at Meijer are attempting to represent the consumers in their

efforts to hold the price lines on the merchandise we sell.

We completely support all the people in the industry and government who are

trying to hold the line on inflation.

To this end, we are appealing to the food manufacturers to help us, as no one segment can do it alone. Direct shipments by the bottlers to our distribution centers would reduce costs, but legislation as introduced will prevent this forward move.

Thank you,

Fred Meijer, President, Meijer, Inc.

Mr. Meijer. Gentlemen, it is a pleasure to appear here today because we, at Meijer, believe that the retailer is the primary party to whom consumers can appeal in their effort to stretch their food dollars.

We believe this is a challenge to us, as retailers, to put forth a maximum effort to control our cost of doing business, thereby minimizing food costs to the consumer. If we don't try to hold down food costs for the consumers, who will? We feel that we should try to be their representative.

The retail food industry is in a very difficult position. While our customers are appealing to us to hold the line on prices, our costs of the items we sell, and our costs of doing business continue to increase.

This would be not so difficult a task if our industry were operating on reasonable profit margins. However, the financial reports of the supermarket companies have not been showing a margin for absorption of increased costs.

In fact, drastic measures are being taken by some of the food com-

panies in order to survive.

In addition to this consumer pressure and lack of profitability, the Government has challenged us to hold down cost increases to help stem inflation. In May of this year, Vice President Agnew challenged a group of industry executives at the Supermarket Institute meeting in Houston to hold the retail price line.

In fact, he went so far, I believe, as to say that if we didn't do it,

the Government would try to find ways of forcing us to do it.

Last week, Thursday, we received a telegram from Donald Rumsfeld reminding us that some beef prices had been reduced to the retailer, and the Government wanted this reduction reflected in the retail promptly.

He gave no room for those operators who already are losing money due to competitive pressures. We are doing everything we can think of to comply with the consumer and the customer request and the

Government demand.

This has included the sending of letters to suppliers asking them to do their best to avoid higher prices; to find ways of increasing their productivity to solve their problems, rather than raising their prices to us and we in turn having to raise them to the consumers.

We have even published the names of suppliers who have raised prices, and who have lowered prices, as an added incentive to the manufacturer to think twice about raising prices as an alternative to

solving their own problems.

Price Commission Chairman Grayson was kind enough to send us a

letter recognizing us and our efforts in this regard.

Yet, while we have done all this, we still face the ultimate question of how to raise productivity as this is one of the few ways of truly

and effectively controlling costs.

We firmly believe that new methods of production and distribution can and must be adopted. I am speaking specifically of the current system of distribution of carbonated beverages, a system that has proved uneconomical in many other food lines, a system that should now be discarded to make way for a new and more efficient method of product distribution.

Years ago, many, many of the national brands of foods were distributed by the manufacturer to each retail outlet. I am referring to such well known companies as Kraft, Heinz, and the list can go on and

on and on.

These major firms discontinued this costly distribution method many years ago, and went to central distribution by cooperative and cor-

porate warehouses such as we have at Meijer.

This discontinuance of manufacturer distribution to the stores has progressed at a rapidly accelerating pace until today there are very few grocery items delivered to the stores by manufacturers or jobbers other than perishables, such as bread and milk, and the subject at hand, soft drinks.

In fact, at Meijer, even though we do not have our own bakery or our own dairy, we still ship approximately 75 percent of all groceries from our distribution center. If we operated our own bakery and dairy.

the 75-percent figure would be substantially larger.

Why this rapid transition from store door deliveries by manufacturers and jobbers to central distribution! Strictly economics, The economics of more efficient distribution methods, the opportunity to buy at the lowest cost, and increased competition among suppliers.

Our experience has proven that central distribution reduces costs in several ways: by large bulk shipments from suppliers to the warehouse with the product then going to the stores on large semitrailers.

Two, more efficient handling with increased use of fork trucks.

cargo carts, and so forth, at store level.

Three, increased use of computer ordering and reordering from

store to corporate office, and office to suppliers.

Four, reduced store door deliveries which would drastically cut costs through reduced receiving labor at the store, reduced receiving

errors, and the ever-present problem of security control.

Five, while store door deliveries are made, many trucks are sitting waiting in the store lots for their turn to get up to the receiving door. At the same time, our semis arrive from the warehouse and unload their entire load of perhaps 1,500 cases, and can be back on the road in 45 minutes, while the individual distributors are unloading only a small part of a small load.

Only one driver is needed to distribute full semitrailers to the store

instead of a driver for each jobber.

The opportunity to buy better has been proven many, many times. as the gentleman from California so graphically outlined in his example of buying in Denver and shipping to the coast and still saving substantial numbers of dollars.

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In this particular situation, the high price is 12 percent higher per case than the low price on one type of retail package; and on another type of retail package, eight-pack returnables, the high price is 25

percent higher than the low price.

We know we can distribute this product for a small fraction of the 12 and 25 percent price spread, and pass the savings on to the consumer.

If it weren't for the territorial limitations, we could take advantage of buying opportunities and save the consumer money. This type of freedom of purchase would create added competitiveness in the industry which should bring out new efficiency thereby reducing costs

It may be argued that central distribution of soft drinks would adversely affect some of the bottlers, but is that argument valid? With the removal of territorial restrictions, perhaps the smaller, agressive bottler would find his niche to build on, while the larger ones would continue to succeed.

I firmly believe that wherever possible the Government should not promulgate laws which may protect inefficient processes or distribu-

tion systems as the bills being discussed would do.

It may be argued that central distribution would hurt the movement of returnable bottles, and this then is an unsound move

ecologically.

Gentlemen, I believe this argument is without merit for two reasons. One, many warehouses now carry one-way bottles only because they are not able to acquire the popular brands of returnables; and two, Meijer stores are currently handling a large percentage of soft drinks in the returnable bottles. If all products were in returnables, we might have an impossible situation.

What is needed is a total systems approach of the sale of returnables

and the reclaiming of the one ways.

An example of this approach is our dedication to recycling as evidenced by some photographs which I have brought along today showing the large bottle recycling stations on our parking lots and the cardboard balers in our stores.

We are currently collecting in excess of 350 tons of recyclable glass per month, and we are recycling in excess of 600 tons of cardboard

per month.

I would like to restate that I believe central distribution of soft drinks attainable through the elimination of territorial boundaries will reduce costs and save the consumer many dollars through more efficient distribution methods, opportunity for retailers to buy at lowest cost, and increased competitiveness in the industry.

We, as retailers, must be ever alert to find better ways to get the

product to the consumer at the lowest cost possible.

In our company we have adopted new shelf-stocking methods to save labor costs. In doing so, many of our products are stocked on the shelves with their labels upside-down, and some even backwards, all to save labor. Our shelves don't look as tidy because more cardboard shows, but the method helps to control our cost of doing business.

In conclusion, we at Meijer are attempting to represent the consumers in their effort to hold the price lines on merchandise we sell. We completely support all the people in industry and Government who are trying to hold the line on inflation and hold down costs.

To this end we are appealing to the food manufacturers to help us,

as no one segment can do it alone.

Direct shipments by the bottlers to the distribution centers would be one step to help reduce costs, but the legislation as introduced will prevent this forward move.

Thank you for allowing me to present this paper.

Senator Hruska. Thank you for your testimony. You have presented some puzzling and perplexing problems—not all that bad; some are good.

Charles Bangert is the general counsel for this subcommittee. Mr.

Bangert, have you any questions?

Mr. BANGERT. Yes, Mr. Chairman. Thank you.

Mr. Meijer, so that we can get it into the record, I wonder if you could give us just an idea of how large your business is, how many stores you have, what areas they cover, and that type of information?

Mr. Meijer. We have 23 stores, of which 14 are combination discount centers and supermarkets, and nine are regular supermarkets. So in effect, we have 23 supermarkets, but in 14 stores there are larger operations.

They cover lower western Michigan, and then we go into central Michigan and Lansing, and we have one store in Ypsilanti, which is in southeastern Michigan.

Mr. Bangert. What is your approximate sales per year?

Mr. Meijer. We are a private company. Must I give you that?

Mr. BANGERT. No; that's all right.

In your statement, you indicated that you were purchasing one particular soft drink from several different firms, and you purchased the product at three different prices on one package, and four different prices on the other package.

What product is this?

Mr. Meijer. Our buyers tell me that it is Coca-Cola.

Mr. BANGERT. Do you have any idea in terms of how those prices

differ in the three areas?

Mr. Meijer. This week and last week, either now or in the very recent past, three of the companies had a sale on in which they would expect us to pass on the sale to our customers.

We were paying \$2.85 to one distributor, \$2.65 to another, \$2.70 to

another, and \$3.25 to the company that had no sale on.

Our buyers tell me that \$3.25 is close to the regular price, varying from that. This is on four packs of six pack. 12-ounce.

Mr. Bangert. That would be on the basis of the store delivery by each of those distributors? Is that correct?

Mr. Meijer. Yes.

Mr. Bangert. Not through your central warehouse?

Mr. Meijer. We are not allowed to buy through our central

warehouse.

Mr. Bangert. Those prices are interesting. You indicate that one was \$2.85, \$2.65, \$2.70. Those are special sale prices, and as I understand, the regular price would be closer to \$3.25.

Mr. Meijer. Yes, as I understand it.

Mr. Bangert. We have some ads that we gathered from an operation in Boston called Soda Hut that was able to purchase on a warehouse basis. They are selling 24 12-ounce caus for \$2.79 a case. So that would be below the price that you would regularly purchase at; is that correct?

Mr. Meijer, Yes.

Mr. BANGERT. And again, presumably he is able to sell at that low

price because of the warehouse delivery.

Mr. Meijer. I feel confident that if we were allowed to buy from the distributor that would sell us at the lowest price, that we would buy at a lower price. I think it would probably surprise us that probably one of the small distributors would be selling us this product at the lower price because sometimes smaller distributors have lower overheads than larger distributors. We have found this is true in some of our other products.

Mr. Bangert. What is your experience with respect to that?

Mr. Meijer. Well, milk, for one thing. We buy from a small dairy in northern Michigan and ship the milk all the way to Yosilanti in southeastern Michigan. We can buy the milk from the small dairy at a lower price than we can in the other areas.

Mr. Bangert. So purchasing through the warehouse does not necessarily mean for you that you would go to the largest competitor in

order to do your purchase?

Mr. Meder. Not at all. We would go to the lowest price, whom-

ever that might be.

Mr. Bangert. And presumably small businesses do have certain efficiencies, and perhaps because they are small, they may be able to offer the lowest price?

Mr. Meijer. We think so, yes.

Mr. Bangert. Do you have any estimate of what type of savings you might be able to achieve if you were able to buy on the open

market and not on the restricted territory?

Mr. Meijer. We have talked about it, and we have the feeling it would be 15 to 20 percent. Maybe we should buy from the fellow in Boston, Maybe we would save more.

[Laughter.]

Mr. Bangert. Do you know what the national markup for super-

markets now on soft drinks is, and what yours is?

Mr. Meijer. Well, ours is 13 percent. The national we understand is more like 18 to 20 percent. But we do run a low-cost, high-volume operation, so this is not unusual that we are below the national market on our selling prices.

Mr. Bangert. So presumably with that type of aggressive competition on your part, you are able to realize a 15 to 20 percent savings on your purchases, and at least a part of that would be passed

on to the consumer.

Mr. Meijer. I think most all of it would be.

Mr. Bangert. When you have to purchase say Coke at three different prices, in three different territories, how do your stores within

those territories price?

Mr. Meijer. Well, basically we have to reflect the—our retail prices have to be competitive with competition, and if competition were to pick the lowest price area and have that in all their areas, then we would be, in effect, absorbing the problem of higher prices.

But basically we price according to the cost of the product. I think basically we would have higher prices in the areas where we

pay more.

Mr. Bangert. Well then I would assume that in terms of your specials—for instance, if you were having a special on a soft drink any particular week, you would have to have different prices for

those specials in each area. Would that be correct?

Mr. Meijer. Yes; that would be correct. I am pretty sure where we have a lower cost on this product that I mentioned, in three areas, that in the other area where we have to pay \$3.25, we wouldn't have that lower retail.

Mr. Bangert. Do you have any idea what the turnover on soft

drinks is! It it a rapid turnover?

Mr. Meijer. It is very high. I would say that because it goes to store level, it is higher than if it goes through our warehouse. This

is one advantage of store deliveries.

The higher turnover is one advantage. We do not have the trucking cost and the warchouse cost. I would suppose it is 40 or 50 times a year, meaning once a week. We think that that would be more than offset by being able to take it through the warehouse, so much so that it is a small thing.

Mr. Bangert. So your efficiencies in being able to buy through a warehouse would outweigh that!

Mr. Meiser. We feel, by far.

Mr. Bangert. Do you know whether or not you are able to receive

quantity discounts on large purchases!

Mr. Meljer. I asked the buyers that question, and on some items some of the time, and from some distributors, we get a discount on 50 cases or more. I am not sure how accurate that it, but that is the best I could find out.

Mr. Bangerr. But that would be up to the particular distributor that handles that territory to determine whether or not he would

give the discount?

Mr. Meijer. Yes, sir. As I understand it, he has complete control

of the prices.

Mr. BANGERT. So at least theoretically you might be buying in large lots and paying the same price as someone who would be purchasing in very small quantities?

Mr. Meijer. I think that is true in some instances, and in some in-

stances we do get some discount.

Mr. BANGERT. You raised the ecology question. One of the things that has been testified to during the hearings is that there is a need for exclusive territorial allocations in order to promote the returnable bottles, and thus aid us in our ecological efforts.

I assume that you believe that with a total recycling program this

same ecological effect could be achieved.

Mr. Meder. There is much conversation about the cans and pop bottles, that they should be returnable for ecological reasons. What puzzles me is why they don't talk about salad dressing bottles, honey bottles, wine bottles, liquor bottles, tomato juice bottles—the many products that we sell in bottles in our stores.

The only reason I can see is that pop bottles are more visible. People ride along the road and throw them out the windows, which

is a nasty habit that I hope is being corrected in this country.

I can't help but remember how, I think going back to Eleanor Roosevelt, she was saying that years ago when she went to Russia and the people were waiting in line at Lenin's tomb, how clean they were there.

I do not want to have the Russian system in the United States, but I think we have learned a lot about throwing things out the windows. I think as our children come along, this will be less and less of

a problem.

Too much is concentrated, I think, on pop and beer bottles, and not enough on the total problem. A can of beaches, a peach can, is just as bad as a beer can—at least I happen to think so. We sell tons and tons of that sort of thing every week, too.

God help us if we had to take all those things in returnable bottles. Our distribution would not be as efficient, and we would not know how

to handle it.

We would have a different store completely, probably twice as big to

handle the salvage.

Mr. Bangert. One of the other areas that we heard about in the last hearings was an apparent reluctance on the part of the chains to handle returnables. As I understand it, that is a cost of doing business which is borne by the chain, and you get no allowance from the soft drink manufacturers for handling these bottles.

Is that correct?

Mr. Meijer. That is as I understand it too, yes.

Mr. Bangert. Is that a significant cost?

Mr. Meijer. It is a very significant cost. It costs a lot of money to take these bottles in and sort them. The pop companies have not even gone to a uniform bottle like the beer companies, making it easy for us. They have to have individual bottles, individually molded and designed, so we have to sort in many ways to take care of these bottles.

It is very costly. It is very messy. Sanitary wise, I think it could be discussed on that subject, on whether or not these things should come

back into a food store.

More and more we are trying to be cleaner and cleaner. We are being

challenged in many ways to improve our sanitation.

I am digressing here. I did not intend to say that, but I really think

it is true.

Mr. Bangerr. But again, as I understand it, you are willing to bear this cost, and you are willing to do it because there is at least some consumer acceptance for it.

Mr. Meijer. If there is a consumer demand, we have to run our business to please the consumer. If the consumer were to demand every-

thing to be in returnables, we would find a way to do it.

Mr. BANGERT. Do you have any idea about what the consumer de-

mand is, returnables versus nonreturnables!

Mr. Meijer. I hate to say this because it will come back to haunt me, but in total there is not that big a demand. I am also disappointed in saying that in total many people do not care much about the ecology, not as much as they should.

I really want to give credit to the people that are working along these lines in motivating it, even though they might be a minority. We have to respect that they are trying to do something. I do not want

to minimize their efforts.

Mr. BANGERT. Mr. Chairman, I have no further questions.

Senator Hruska. Thank you very much, Mr. Bangert, for your

bringing out some very valuable facets.

Mr. Meijer, in your statement, you call attention to the fact that you currently purchase some of your major brand soft drinks from distributors who have restricted areas, and as a result, there are higher prices and lower prices afforded by various of these distributors for the same product.

Mr. Meijer. Yes, sir.

Senator Hruska. In some quarters that would be called a blessing because some of the prices are lesser than other prices. In other quarters it is thought of in reverse, and it is said that some prices are higher than other prices.

Also, we come across this in our dealings with competition and with antitrust and monopoly problems. When there is only one product—one price for a given product—that shows lack of competition; whereas if the prices to vary, it indicates a difference in cost, and there is competition, and competition is desirable.

Would you like to discuss those various things that we meet up with all the time? I have sat here when we have had our present chairman, and his predecessor, the late and lamented Mr. Kefauver, and by golly,

he said that when there is a single price, that shows there is no

competition.

Now then, we have several kinds of prices here, and you complain about it. Can you help us out a little in that difficulty that we encounter in this regard?

Mr. Meijer. I think I can help out. I am not sure I am articulate

enough to explain it.

In effect, we are saying there are different prices in different areas, but we are not allowed to choose between those prices, and therefore

there are no different prices for those areas.

This distributor says, "If you want to buy this product, this is what you pay in my area." If we were allowed to pick and choose amongst these prices and be able to bring it into the distribution center and then send it out, then there would be competition. Then there would be different prices.

What we have said is that there are different prices in different areas, but in that area no different prices. Some man has said, "This is my price—period." So we do not have a choice of prices. We just have to buy at different prices for different cities, or different territories.

So I would agree with what I think you are saying, but I think you would have to agree with me. If the fellow there says, "My price is \$3.25 in my territory and you may not ship in the \$2.65 item in there," therefore we only have \$3.25 in that territory. We only have one price.

On the other hand, the other man says, "I can make a profit at

\$2.65, and I'll sell you that in my territory."

Maybe someone would come along that would sell us in all terri-

tories at \$3.25. This would be price competition.

I think what you are saying is that you think price competition is advisable, and if that is what you are saying. I agree with you. But this is not price competition. This is price setting in each little domain, like a little duchy of their own.

Senator Hruska. Let us imagine a territory A in which you have a store, and X soft drink there is made available to you by an exclusive

territory dealer.

Now in territory B, you have also your retail outlets, and there the

same X soft drink is available to your store in territory B.

If the price is lower in territory B for your outlets there, does that necessarily mean that that same price is available to you in territory A that is somewhat distantly located from the source in the distributorship in territory B?

In other words, the cost of the time engaged in delivery, the expense of delivering from a more distant distributor, add to the cost of the product in such a way that there would not be a lower price for

you in territory A if you bought from distributors in B.

Do you get my picture?

Mr. Meijer. I get your picture. You are saying if territory A is a higher labor cost area or must ship farther, or has special conditions that are a problem, he is entitled to more for producing the product.

Senator HRUSKA. Somebody has to pay for the transportation and

time and expense that it takes.

Mr. Meljer. But what if it is due to his inefficiency and if transportation has nothing to do with it, and he is still charging a higher price?

I think in most cases this would be the prevailing situation.

Senator Hruska. Wouldn't that even itself out if it were the result of inefficiency, and a man in territory A is charging too much, and you buy product X, and you find that you have to get your markup and the sales do not quite look as good as they do for product Y -and the consumer looking at that price of product X says, "Oh, that's too much. I'll buy product Y."

It is not Coca-Cola, but it's Pepsi-Cola, or uncola, or something else. Then what happens? Doesn't the manufacturer of X soft drink say, "Wait a minute. I am not making enough sales in this area. What's wrong!", and he investigates and he finds out that that distributor is inefficient and therefore he is not getting the sales.

Doesn't the free market take care of that sort of thing? Mr. Meijre. In this case, I don't think so. I realize it is a matter

When you like a certain brand of product, or if that certain product has a very specific taste—after all, I am not sure that any of us drink soft drinks for their food value. I think we drink it for pleasure.

I think a lot of the things we eat and drink are for pleasure and not

for the food value.

So if you were told that this is what you want for your pleasure, it gives you more gusto or something. I think you will buy it at the store—if you are price conscious—at the store that has it for the lowest.

But if all the stores have to pay a higher price, the prevailing price

would be higher.

I think that what you are saying is that they are building an umbrella. If they are too high, for somebody else to come in with a different product that hopefully will satisfy you to get the business with. And if another person can come in with a product that is equal in the minds of the consumer, you are right.

If this manufacturer has done such a terrific job of producing a special taste or a special image, then I would think that what you

are saving-I do not think it would prevail.

Senator HRUSKA. We can go on and on, like you suggested a minute ago. Of course we run into different situations, and when we legislate, we legislate for everyone, the efficient as well as the inefficient—your kind of store and the other kind of store.

Let me suggest to you something that was brought out in testimony that is on file with this committee. This is in a little different field.

But again, if we are going to legislate, it will have to be for the beer dealer as well as for Coca-Cola, and as much as for soap, detergent, or whatever.

Here is the testimony of one of the beer dealers that has come before

us. He is from Illinois.

He says:

I believe the exclusive territorial arrangement is almost a necessity for our wholesalers to survive in this industry. If the large chains are ever allowed to have central warehousing and direct purchasing, it will practically eliminate the small retailer in all of our marketing area.

Where we now have 20,000 licensed retailers in Illinois, I can see this number dropped drastically, meaning a loss of revenue and thousands of people put out of

work.

I might add to that, if there are any great drops in the number of retail outlets, perhaps the convenience of the consuming public is also affected.

Would you have any comment on a situation like this which could also be brought about, you see, by the lack of passage of such as a law we have in the bill on which hearings are being held?

Mr. Meijer. Yes; I do have comments.

Senator Hruska. Would you like us to have the benefit of them?

Mr. Meijer. Yes, sir.

Wholesalers, cooperative wholesalers, are extremely efficient today. The entire Penney food operation is supplied by voluntary and cooperative wholesalers.

In vesterday's "Supermarket News," I noted that the Treasure Islands Stores in Atlanta, Ga., which are owned by the J. C. Penney Co., are now going to be supplied by a co-op in that area. I cannot remember the name of the co-op.

In our area the Penney stores are supplied by a co-op in Muskegon, Mich., and a co-op and a voluntary company, I believe, called Scot Lad,

out of the Chicago area.

These sources of supplies are available to every small retail outlet and enables the smaller retail companies to buy very effectively and efficiently.

In our area there is a very fine co-op organization, and our biggest competition is given to us by—one of our biggest competitions—by an

independent who is supplied by the co-op.

So these co-ops would take in these beer items and these beverage items, and there would be no need for a drop in smaller stores or in the independents because of this factor.

Now if there is a drop in numbers of stores due to transportation changes or efficiencies that larger stores have, then some of the smaller stores would get larger, and some of them would be convenience stores.

But I do not think that one store would have to be eliminated, go out of business, or one store would be lost to the service of the consumer if central warehousing came about in both beer beverages as well as soft drinks.

I think his argument is entirely without foundation.

Senator Hruska. There is an answer to that. I shall not give it.

We shall have testimony on that point a little bit later.

Tomorrow, for example, the National Institutional Food Distributors Association will testify. I am not going to be their advocate.

I ask these questions very often as a devil's advocate. So we will let them speak for themselves.

Thank you very much for your testimony—unless you have further comment. Have you?

Mr. Meijer. No; I have no further comments.

Senator Hruska. Thank you for coming. You have helped us a

Mr. Meijer. Thank you for asking me.

Senator Hruska. Our next witness will be Mr. Ray Schoessling. Did I pronounce your name right?

Mr. Schoessling. Yes, Senator. You came close.

Senator Hruska. Mr. Schoessling is vice president of the International Brotherhood of Teamsters, and he comes from Chicago on South Ashland Boulevard, no less.

Mr. Schoessling. Yes, sir.

Senator Hruska. When I went to law school at the University of Chicago, I learned where South Ashland Boulevard is.

Mr. Schoessling. It is just directly west of it. You would not recog-

nize the neighborhood anymore. It is just beautiful.

Senator Hruska. Your statement is on record, and your whole statement will be placed in the record in its entirety. You may proceed with your testimony.

# STATEMENT OF RAY SCHOESSLING, VICE PRESIDENT, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. Schoessling. My name is Ray Schoessling. I am a vice president of the International Brotherhood of Teamsters. I am also president of the Teamsters Joint Council in Chicago, which is comprised of local unions with 160,000 members in northern Illinois.

I am also president of the Teamsters Local Union 744, which has jurisdiction over the production, warehousing, and delivery of soft drinks in the Chicago area. I am the secretary-treasurer of the soft drink division of the International Brotherhood of Teamsters.

Our international union, with over 2 million members, strongly supports the franchise system. Accordingly, we urge a favorable report by the committee of bills that would continue the traditional methods of permitting exclusive local franchises and maintenance of standard distribution practices in the soft drink industry.

It has been my privilege to represent workers in the soft drink

industry for over 35 years.

There are over 123,000 employees in the soft drink industry, and

about 8,000 more in management and supervision.

A large proportion of the production, warehousing, and route delivery personnel are members of local unions affiliated with the International Brotherhood of Teamsters.

These local unions negotiate collective bargaining agreements directly with franchise holders and/or local associations of bottlers. We have developed a sound and mutually productive relationship

between our union and the employers.

The franchise system has permitted the development of genuine

maturity in collective bargaining.

We have recognized the employers' problems in adapting to changes in technology, and the impact of a growing market for their products.

We believe that the records will show labor and management in the soft drink industry have achieved unusual success in union-employer relations.

The franchise system is a vital factor in producing this record.

I am sure that the manufacturers and franchise holders will provide adequate justification for enactment of the legislation under discussion from their point of view.

I would like to point out certain factors in the franchise system as they relate to employees in the industry. The franchise system sets

territories for sale by the bottler.

He is assured of the integrity of his investment in plant and equip-

ment because of the franchise.

The employees are reasonably assured of continuity of employment because the bottler will have a relatively steady share of the market.

If the employer is deprived of the exclusive sales territory by the Federal Trade Commission, the impact on the employees' welfare would be devastating.

Competitors producing the same product at lower wage levels in other communities would undermine the pay and conditions of workers

in the franchise holder's territory.

There could be a temporary price advantage to the consumer, but this benefit would soon disappear as soon as the invader achieved control of the market.

Elimination of exclusive sales territories would create chaos in the

labor-management picture.

Employees in the industry, through their unions, have negotiated excellent health and hospitalization benefits.

This has been made possible because the franchise holders have been

familiar with the problems of their employees.

Through exclusive sales territories, they can generally forecast the cost factors of these benefits. This is especially important where employee pensions are concerned.

The viability of these benefits, designed to provide a life of decency and dignity for these workers when they retire, is dependent upon the

employers staving in business.

Bottlers permitted to come into a territory of a franchise holder which has an agreement with a local union for pension benefits could cause the demise of the pension, with the resulting indignity to the worker.

I am sure that the members of this committee are aware of the concern of another committee of the U.S. Senate with the fact that many pension systems are withering away before the worker reaches retirement age.

All of us in the trade union movement know of the personal tragedy caused by the disappearance of the security on which a worker had

based his hopes for his declining years.

I will leave to the lawyers the discussion of the legal principles involved in the Federal Trade Commission's action against the franchise system in the soft drink industry.

The workers that I have the honor to represent have nothing to

sell but their strength and skill.

If they are monopolists, they have a monopoly on the hard work that goes into the production, distribution, and sale of their product. They have a monopoly on the insecurity that would come with loss

of jobs and income.

They have the so-called work ethic: They like steady jobs with decent pay, sound benefits for their families, the opportunity to make progress with the advancement of the economy and their industry, and the assurance that they will be able to retire with a measure of security.

The franchise system in the soft drink industry helps our union to

avoid the harassment of territorial jurisdictional disputes.

This is a contribution to the stability of labor-management relations

and the continuity of production.

In no sense do we, as a union, want to eliminate competition in our industry. There is plenty of vigorous interbrand competition for the

consumer's favor, as is evident in the vast amount of advertising purchased by the various soft drink manufacturers.

Our purpose is continuity of employment, security of our pensions

and other benefits, and a share in the growth of the industry.

Your support of legislation to continue exclusive territorial arrangements in the soft drink industry would be a contribution to the stability of employment of our members, eliminate the danger of unfair competition that would endanger their living standards, and avoid the difficulties arising from jurisdictional disputes between unions.

The legislation is necessary because the litigation initiated by the Federal Trade Commission can create a long term situation of

uncertainty.

During this period, many bottlers with whom we negotiate for our members' wages, benefits, and job conditions, will be reluctant to initiate or improve long term gains for their employees.

We urge a favorable report on the legislation before you.

I, Gentlemen, appreciate the invitation to make this presentation on behalf of the workers in the soft drink industry.

Senator Hruska. Thank you, sir.

Mr. Bangert, have you questions of the witness?

Mr. Bangert. Mr. Chairman, in view of the fact that we received the statement just about a half hour ago, I wonder if we could study it over and reserve the right to submit questions in writing if we would have them at that time?

Senator Hruska. That would be fair. Then you could reply in writing, Mr. Schoessling. Normally we have the statements filed in advance, a day before, so that we can do just what counsel provides.

Thank you for your statement. You can await letters then from

either the counsel for the committee or from the chairman.

Mr. Schoessling. Thank you, sir.

Senator HRUSKA. This will exhaust the witnesses available today.

We will take a 5-minute recess at this time.

An effort will be made to hear witnesses representing the National Soft Drink Association. They are scheduled now to testify tomorrow, but if we are able to do it, we will hear them, and maybe we will postpone until Thursday the other two witnesses who will appear.

Therefore we will not be required to hold a meeting of this subcommittee tomorrow. That is of some importance because the Senate is

in constant session.

We started at 9 this morning, and I presume that we will resume at 9 tomorrow morning until 7:30 or 8 at night.

We will save some time, and it will serve that purpose, too.

We will resume our session in about 5 minutes.

(Whereupon, a short recess was taken.)

Senator Hruska. The committee will reconvene.

We have representatives of the National Soft Drink Association who are accommodating us greatly by appearing today rather than as scheduled, tomorrow.

The witnesses will be introduced by Thomas F. Baker, who is executive vice president and general manager of the National Soft Drink Association located here in Washington.

# STATEMENT OF THOMAS F. BAKER, EXECUTIVE VICE PRESIDENT AND GENERAL MANAGER, NATIONAL SOFT DRINK ASSOCIATION

Mr. Baker. My name is Thomas F. Baker. I am executive vice president and general manager of the National Soft Drink Association located in Washington.

With me are three soft drink manufacturers who are members of

this association.

They are Mr. Harold L. Corwin from Vancouver, Wash.; Mr. Gid W. Gates, Greeley, Colo., and Mr. R. R. Cameron of Washington, Pa.

In the first week of hearings on these legislative proposals, the committee heard from the president of the association, Mr. Crawford Rainwater, who spoke to the resolve and the overwhelming unity of soft drink manufacturers in their support of these bills.

Also, you heard from John Strachan, a small bottler from New York State, and  $\Lambda$ . D. MacDonald, representing a large California soft drink company, who substantiated the views of the membership voiced by

Mr. Rainwater.

Our purpose here today is not to repeat that testimony, but to make it more real for the committee if that is either necessary or helpful.

Those of us who intimately know this industry—and I have worked in it for 37 years—are acutely aware that the views of three witnesses invited by the committee from the industry, Mr. Alden from Denver, Mr. Uzzo, who will appear subsequently in the hearings, from Louisiana, and Mr. Foster from California, are or will be contrary to the views of almost all other soft drink manufacturers in the country today.

There may be one or two others but, as a matter of fact, even now, I couldn't name another small, franchised bottler in the Nation today who wishes to lose the territorial provision in his licensing agreement

as a result of the FTC complaint.

In no other matter before the industry, in my experience, have bottlers so loudly and so willingly voiced their collective views than in the need to preserve the territorial provisions in our franchise agreements.

While we believe it is evident that those three witnesses spoke, or will speak, from the very narrowest of bases, in terms of representing anyone other than themselves, we are aware, also, that to persons not familiar with the industry, it may not be clear that those witnesses spoke only to a very narrow soft drink marketing channel as well.

That is, the primary distribution of product only to foodstore out-

lets and in one-trip containers, cans or bottles.

Of course, no one denies that this small segment of the market would but thrive under the restructured industry proposed by the FTC staff. Quite to the contrary, everyone seems to be in agreement that this segment of the market will flourish, but to the near demise of all others. And, unavoidably, in our view, to the disservice of consumers and bottlers alike.

Second, Mr. Chairman, we have some concern that a less than careful reading of the record might imply that because Mr. Foster, Mr. Alden, and, subsequently Mr. Uzzo, sell very few cases of soft drinks,

the voice of small bottlers may not have been represented in the overall industry statement.

To totally dispel any such erroneous impression, we asked for and you have been kind in permitting the inclusion of testimony from these

additional industry witnesses.

My role this morning, Mr. Chairman, will be an introductory one only. We suggested these three bottlers appear before the committee because they are truly representative of the many hundreds who make

up this industry.

They are typical soft drink manufacturers. They are not representative of the small number of large bottlers from very large metropolitan areas, on which the staff of the FTC appears to be focused beyond distraction; nor are they representative of the smallest bottlers in the

country, of which there are quite a few.

These men, Mr. Chairman, reflect the size and circumstance of the vast majority of businessmen in this industry. When the FTC staff, or we in the association, or franchise company officials, or even members of this committee speak of "the bottlers" in the collective, total sense, these are the kinds of people and companies being referenced.

We have asked each of these three bottlers to tell you very briefly something of his company, the market he serves, and his frank pre-

dictions if the FTC succeeds in the pursuit of these complaints.

They are prepared also, Mr. Chairman, to frankly respond to any questions you, or the staff, may wish to direct to them. Our purpose is to provide a candid, reliable, firsthand source of industry intelligence to the committee.

The first witness, Mr. Chairman, with your permission, will be Mr.

Harold Corwin.

Senator Hruska. Mr. Baker and gentlemen, you gathered from our remarks a little bit ago, we are little bit under our time-bind when we scheduled our hearings, so we, of course, are not able to forecast what has happened. We are driving toward adjournment. We hope to get out of here and go home and talk to our constituents and let them talk to us.

I am wondering if we could—counsel informs me—Mr. Bangert informs me that he doesn't have very many questions. However, the fact that he has some questions indicates that he has read your statements and that he is familiar with them and so has Mr. Chumbris here, on my

left, the minority counsel.

I am wondering if it would be satisfactory with you that you consider these statements read and that questions be asked of you in lieu of going through all of them.

Would you have any objection to that or would you prefer to

properly read them?

Mr. Baker. Yes, sir. We will ask that you insert these statements in the record as if they had been presented totally and do what we can to best answer your questions at this time.

Senator Hruska. That would be very fine.

It is ordered, therefore, that the three statements be printed in the record at this point in their entire text, and with that, Mr. Bangert, you may proceed with your questions.

(The documents follow. Testimony resumes on p. 484.)

Mr. Chairman, my name is Thomas F. Baker. I am Executive Vice President and General Manager of the National Soft Drink Association, located here in Washington. With me are three soft drink manufacturers who are members of the Association. They are Mr. Harold L. Corwin, Vancouver, Washington; Mr. Gid Gates, Greeley, Colorado; and Mr. R. R. Cameron of Washington, Penn-

sylvania.

In the first week of hearings on these legislative proposals, the Committee heard from the President of the Association, Mr. Crawford Rainwater, who spoke to the resolve and the overwhelming unity of soft drink manufacturers in their support of these bills. Also you heard from John Strachan, a small bottler from New York State and A. D. MacDonald, representing a large California soft drink company, who substantiated the views of the membership voiced by Mr. Rainwater.

Our purpose here today is not to repeat that testimony, but to make it more

real for the Committee if that is either necessary or helpful.

Those of us who intimately know this industry—and I have worked in it for thirty-seven years—are acutely aware that the views of three witnesses invited by the Committee from the industry. Mr. Alden from Denver, Mr. Uzzo from Louisiana, and Mr. Foster from California, are contrary to the views of almost all other soft drink manufacturers in the country today. There may be one or two others but, as a matter of fact, even now I couldn't name another small, franchised bottler in the nation today who wishes to lose the territorial provision in his licensing agreement as a result of the FTC Complaint. In no other matter before the industry, in my experience, have bottlers so loudly and so willingly voiced their collective views than the need to preserve the territorial provision in our franchise agreements.

While we believe it is evident that those three witnesses spoke from the very narrowest of bases, in terms of representing any one other than themselves, we are aware also, that to persons not familiar with the industry, it may not be clear that those witnesses spoke only to a very narrow soft drink marketing channel as well. That is, the primary distribution of product only to food store

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Mr. Chairman, the first witness will be Richard R. Cameron, then Harold

Corwin, and Gill W. Gates.

### STATEMENT OF MR. RICHARD R. CAMERON

Mr. Chairman, my name is Richard R. Cameron. I am part owner of a local,

franchised, soft drink bottling company.

The official name of our company is the Coca-Cola Bottling Company of Washington, Pa., Inc. The company was founded in the year of 1889 by my grandfather, Wilfred Cameron. At that time the only products he bottled were Cameron Beverages—a line of flavored soft drinks. In the year 1919, he obtained the Coca-Cola franchise and it was also around this time that my father became active in the company business. In 1929 grandfather died and dad took over the operations.

The next major step was the incorporation of our company in 1938. Basically this move was designed to give longerity to the franchise as dad realized he had sons coming up who would undoubtedly be interested in the business. He also then became a first line bottler shortly thereafter as he negotiated with

the Thomas Company on this important matter.

My older brother, Pete, came into the operation on a full-time basis in 1949 and I came in the year of 1950. We had both worked in the summers for many years prior to this. Dad remained President up until ill health several years ago. At that time, Pete took over the Presidency and I became Vice President of the corporation.

Approximately five years ago our younger brother, Don (17 years younger), came into the business and today is a vital cog in our operational procedures. He is the field man on all sales and special events and is consulted on all pack-

aging changes.

Dad passed away in January of this year and, of course, we three sons now operate the business. May I add at this time that we (Pete and I) also have sons who are working summers in this business and we hope might be able to step in and carry on the family tradition after their education has been

completed.

Our franchise encompasses some 17,000 people in the southwest portion of Pennsylvania. The territory is divided into many small towns with Washington being the largest with a population of approximately 25-30,000 people counting all its suburbs. The other towns range from 1,000 to 12,000 with also a lot of rural population. The main industry being glass and steel, but no real big mills such as Pittsburgh has. As a matter of fact, many of these mills are still on returnable bottles and 90 percent of them are still on the 10¢ sale with no immediate plans for any increase. Quite a few of these smaller plants depend on us for their refreshment service and we take care of all that request it from five employees up.

Around 25 percent of our total business could be classified as supermarket or big food store business. Cans and one-way bottles account for about 25-30 percent of our total volume also. Recently to help increase the acceptance of our 16 oz. returnable bottle, we put the aluminum reseal cap on it. This package offers Coke to the consumer at a very low price per ounce and this is what we strive to do. A quality product in a convenient package at a low

price per ounce to the consumer.

Our case sales last year were approximately 750,000 cases with approximately \$1,500,000 in total dollar value. There is no doubt that we have had a steady and healthy growth curve throughout the past years. In reality this is what we strive for. It has been achieved by hard work, a dependable and loyal work crew (yes, we are union), marketing decisions, and the addition of new products such as Tab, Sprite, Fresca, Dr. Pepper and Cameron Beverages. We have introduced these products over the years to provide the buying public with a diversified line of quality soft drinks. In so doing, it has given us one more sales weapon in the ever competitive soft drink market.

Our plant has 11 regular routes and approximately 30 people working full time. In the summer we hire approximately 10-12 college or high school summer workers and the winter we use several part-time boys from the local high school special education classes under the tutelage of the local school admin-

Our payroll excluding top management is around \$250,000 annually and our tax load, real estate and corporate, runs around \$100,000 a year federally and approximately \$50,000 statewise. Each year we donate to the local charities, etc. between 4,000-5,000 dollars. Our most recent gift was a \$10,000 donation to the local YMCA building fund.

This is a brief run down on our operation. Obviously many things about it have been left out, but one thing does come through. It is a company of hard work, fair play and dedication to a product; that product is Coca-Cola. Everything we have ever done has been done with one thought in mind and that is to create consumer demand for Coke. We have taken the bitter with the sweet. We deliver on a steady, dependable basis to everyone, large or small. We have kept our pricing competitive all through the years and believe me there is plenty of competition, not only Pepsi, RC., 7 Up, Canada Dry, Cott and so on seemingly forever, but also iced teas, powdered mixes, syrups and you name it. This business has never lacked competition. If anyone says to the contrary, let them relive my life for me. Let them deliver an order on Sunday morning or at 10 o'clock Friday night, or clean up the County Fair 'til 3:00 in the morning or try to get adequate shelf space at the local market or try to place a vending machine at a new service station, etc. We have had so much competition that we run our business on a very humble basis and the customer seems to always be right. But through all this, we have aimed at consumer demand for Coca-Cola.

Now enter the F.T.C. complaint against the soft drink franchise system and what do you have. First off, all this hard work, investment, blood, sweat and tears for Coke won't mean a thing to us in the larger chain and warehouse operations. Coke in cans and NR bottles will be the only packages available and we all know it will come from some mass producing outlet along some interstate highway more than likely owned by the supermarket chain or warehouse outlet itself. The returnable bottle will be finished in those accounts and the NR's will take over. It seems strange that with all you hear about ecology today that the government would even consider a move that would automatically eliminate the most ecological package ever devised—the returnable bottle. Eventually though, this would be the case and before too long the average supermarket buyer or any buyer, as a matter of fact, will only have one choice and that is a one-way container at a higher cost—be it can

or non-return bottle.

Now what is left for us would be the smaller accounts not wanted by the bigger NR companies. We will be hard-pressed because of our volume loss and our costs will mount. Before long we won't be able to operate and by the same token, nobody will want to buy us out at a fair price considering all the hard work, time and investment over the past 82 years.

This F.T.C. complaint will definitely put the smaller and medium sized

bottler out of operation and reduce his resale value to nothing.

This whole thing is so unbelievable that it doesn't even seem possible. Change is great, but change just for the sake of it and for the worse, or better yet for chaos, is hardly the right way. We have lived in friendship and understanding with our surrounding Coca-Cola bottlers for years and we get the job done. Nobody that I can think of has ever deliberately violated the franchise lines and we all have worked together. It is not that hard and the majority of bottlers will tell you the same thing. By majority I mean 99 44/100

percent of them and that is a fact.

In closing let's summarize it this way. We have operated since 1919 within the Coca-Cola Franchise System. Our product has been prepared on the highest level of quality. It has been competitively priced so much that ounce for ounce it is as cheap or cheaper than it was back when I started in 1950 and it is distributed on a wide and fair basis to everyone so requesting, large or small. The franchise system is good, it is fair to all parties and has proven to be this way over the years. Therefore, it is my considered opinion and also the opinion of all bottlers in Western Pennsylvania that the legislation in front of the Congress today should be passed. It is a matter of survival for all of us.

### STATEMENT OF MR. HAROLD L. CORWIN

My name is Harold Corwin. I am the president of Corwin Beverage Company of Vancouver. Washington, which is in the southwest corner of the State of Washington directly across the Columbia River from Portland, Oregon.

Our company was founded 31 years ago as a family partnership. In our initial year we constructed a 7500 square foot bottling plant, operated five trucks and had six employees with an annual payroll of \$13,000. The company was launched on a purchased territorial franchise encompassing four counties with a population of about 99,000. In our first full year of operation we had a total of \$62,000

in sales and lost \$1,100. Our three franchised products were Pepsi-Cola, Seven-Up

and Nesbitt's Orange.

Since we have reinvested over \$1.000,000 in equipment, material and buildings. Our facilities today include a 40,000 square foot bottling plant and a 10,000 square foot warehouse. We have 40 employees and an annual payroll of \$350,000. We have 35 trucks delivering and servicing 1,240 accounts with six franchised products: Pepsi-Cola, Seven-Up, Nesbitt's Orange, Hires Root Beer, Squirt and Schweppes.

Our sales volume in 1971 was \$1,500,000 and our projected sales for 1972 will

be \$1,900,000.

Our market includes four Southwest Washington counties with a combined

population of approximately 200,000.

Our company purchased our present territory because of the franchised agreement. Without this protection, we would not exist today. We consider our territorial protection our most valuable asset. Without such an agreement we would have had neither the incentive nor courage to plow back profits and borrow capital to expand our facilities. Our growth as indicated in the brief history attached to this statement proves that our territorial system works when one is willing to work and apply sound business practices.

Even though we are considered small by today's business standards, our capital investment is some 75 times larger today than it was when we started. And of course, our taxes have grown equally. Not only has the franchised agreement provided us with the incentive to build and expand, it also has served as a factor for protecting the consumer. A study of comparable food items will attest

to this assertion.

Portland. Oregon, with a marketing population exceeding 900,000, is located less than 15 minutes from Vancouver. Its bottling plants represent all major franchises, including the products franchised to our company. All but one of the major bottling plants in Portland serve our territory with products other than ours. If there were no territorial agreements, we not only would be faced with existing competitive products, but with competition for our own products from companies many times larger than ours. Should this situation be allowed to exist, we simply could not survive.

Should the Federal Trade Commission theory be adopted, we will suffer a major loss among our grocery store customers, which constitute a preponderance of our total sales, Furthermore, as grocery chains turn to centralized buying—which would be inevitable—there is no assurance that the consumer would benefit from lower prices. Franchised bottlers maintain a high percentage of returnable containers and if the FTC theory is accepted and territorial agreements are eliminated, there could be only a rapid termination of returnable bottle soft

drinks with resulting higher prices to consumers.

Furthermore, franchise agreements demand specific standards of purity and quality. The local bottler is held responsible for both in his defined territory Should the territory become fair game for all, there is no assurance these standards could be policed or maintained. It would be eminently unfair for the product image of the local bottler to suffer because of products brought into his territory that did not meet quality standards by sources over which he had no voice nor control.

In summary, I am vigorously opposed to the Federal Trade Commission proposal to eliminate the territorial franchise agreement for these reasons:

1. It would virtually wipe out the small bottling company owner, unable to match the giant in dollars.

2. It would eliminate the incentive for the small bottler to reinvest profits and borrow capital to expand.

3. It would fatally endanger the deposit container.

4. It would endanger the present system of maintaining required standards of product quality and purity.

In conclusion, permit me to make two personal observations:

First, I have always been under the impression the FTC was created and maintained to prevent or discourage dominance of big business through the elimination of the small businessman. If the small businessman is eliminated, only the giants will survive. Hence, the FTC will have performed the precise opposite of its intended function.

And last, if the Federal Trade Commission theory is adopted, it will hand to big business, absolutely without obligation—and without big business even having asked for it—the fruits of years and years of market development and

effort by small business, such as my family's. Mr. Chairman, that is simply not just. It is not right and it should not be the action of my own government. If the territorial restriction is illegal today, it was illegal thirty years ago before I invested my lifetime and my life's savings, as well as money borrowed from others. That was the time—thirty years ago in my case, and as many as three generations ago in the case of others—for the government to say, "you can't do this."

I hope, Mr. Chairman, that the Congress will not permit this proposed FTC action to take place.

Thank you.

CORWIN BEVERAGE CO. D.B.A. PEPSI-COLA AND SEVEN-UP BOTTLING CO., VANCOUVER, WASH., HAROLD L. CORWIN, PRESIDENT

#### BRIEF HISTORY

September 1940:

Formed a family partnership and started construction of 7500 square feet.

January 1941:

Started operation. Six employees.

Annual payroll: \$13,000.

Five trucks.

Franchise population: 99,000.

Franchise products: Pepsi-Cola, Seven-Up, Nesbitts Orange.

Sales volume 1941: \$62,000. Capital investment: \$15,000.

August 1972:

Plant size 40,000 square feet. Warehouse size 10,000 square feet.

40 employees.
Annual payroll: \$350,000.

35 trucks.

Franchise population: 200,000.

Franchise products: Pepsi-Cola, Seven-Up, Nesbitts Orange, Hires Root

Beer, Squirt, Schweppes.

Sales volume 1971: \$1,500,000.

Sales volume 1972 (est.): \$1,900,000. Capital investment: \$617,000.

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#### STATEMENT OF MR. GID W. GATES

My name is Gid W. Gates, I am President of the Seven-Up Nesbitt Bottling Company of Greeley, Colorado.

The company was incorporated in Greeley, Colorado in March of 1948. The company was founded by H. F. Timbers, my father-in-law, Ray H. Timbers, my brother-in-law, and me. We are the only stockholders and directors of the company.

The company holds franchises to manufacture and sell Seven-Up. Nesbitt's products. Hires Root Beer, and Double Cola. We also have a distributors' con-

tract for Squirt and Schweppes products.

Geographically, Greeley is located 50 miles north of Denver, Colorado, and 50 miles south of Cheyenne, Wyoming. We serve the counties of Weld and Larimer in Colorado. The present population of the two counties is approximately 200,000 persons. The area economy could be described best as rural, with 60 percent of the gross dollar sales being derived from the cattle industry and agricultural products.

Our company employs 21 persons: 10 in sales: 8 in production: and 3 in administration. We operate 8 route delivery trucks and one service and special events truck. In 1971, our company sold 342,507 cases. Sales to chain stores and supermarkets represent 53 percent of our volume. Sales to non-chain, restaurants, bars, service stations, etc., represent the other 47 percent of our volume.

If franchise boundary lines are declared unlawful, in my opinion, you would

see the following progression of events occur:

1. The major metropolitan or dominant franchise bottlers could start making warehouse deliveries to the chain operations. The products could conceivably show up in the territories of several of the smaller fringe area bottlers. The most convenient packages for warehouse deliveries would be cans and nonreturnable bottles and undoubtedly they would comprise the greater portion of the deliveries. Cans and nonreturnable bottles on an ounce for ounce equivalent sell for 25 to 30 percent more than returnable bottles. The consumer might soon lose his choice of buying either a returnable or nonreturnable package. If this were to occur, our company would stand to lose 20 to 25 percent of the present volume in chain stores at the outset and another 10 to 15 percent with the passage of time. Bottles and cases are one of the major investments of all bottling plants. If franchise boundary lines were eliminated, the bottles and cases that we have purchased could be picked up by another bottler at a deposit price that does not reflect their true cost. The effect of their loss would be devastating.

2. The second step or stage might be to send route sales trucks into another bottler's territory. They obviously could not take over all of the accounts. Time would only tell how successful they would be. By sheer financial strength and by sheer numbers of delivery trucks and available personnel, the dominant bottler could eventually achieve enough distribution so as to make a plant such as ours

marginal. A marginal plant cannot survive.

The elimination of the franchise boundary lines would leave a company such

as ours with but three choices:

1. Offer to sell at once to the dominant bottler at a price that would undoubt-

edly be much less than what the company is worth.

2. Merge with another local bottler in hopes that our position in the market and our financial strength would be increased to the point where we could at least head off the inevitable for as long as possible.

3. Adapt our operations to the events that occur and go broke fighting. I would be happy to answer any questions that the committee might have. Thank you.

Mr. BANGERT. Thank you, Mr. Chairman.

Mr. Gates and Mr. Corwin indicated that they are distributors for Schweppes. And it is my understanding that Schweppes has recently done away with their exclusive territories. I wondered what your experience is on this product now that they have done away with exclusive territories.

Mr. Corwin. In answer to your question, we do bottle and distribute Schweppes in the Vancouver, Wash., area and four counties which are 10 minutes from downtown Portland; and in Portland, there is another bottling company that does handle Schweppes.

There are instances where Schweppes does come into our territory and, as you indicated, they have allowed this now, but we do not have any problem, really, because Schweppes is not a high volume product.

It is a very minor part of our total business and we are not that concerned about it.

If it were a larger volume product, we would be most concerned and

we hope that they would change their views.

I have been in this business for 30—in my own business for 31 years, and the territorial agreements are the only way that I would exist, and have existed, and bottled in that context for 31 years.

Senator Hruska. Will counsel yield?

Mr. Bangert. Yes, sir.

Senator Hruska. When was that change made, Mr. Corwin?

Mr. Corwin. As my memory serves me, it has been a little less than a year. It is not a factor in the total franchise business.

Senator Hruska. I was just wondering how recent it was and how

much experience you might have gathered in that time.

Mr. Corwin. Nine to 10 months, somewhere in there, Senator. Mr. Bangert. Do you deliver Schweppes into Portland?

Mr. Corwin. I do not.

Mr. Bangert. And Mr. Gates, do you deliver Schweppes into Denver or any of the other surrounding areas?

Mr. Gates. No, sir; I do not. I am not a manufacturer of Schweppes;

I am merely a distributor.

Mr. Bangert. When did Schweppes change in your territory, Mr. Gates?

Mr. Gates. Sir, I have been a distributor since June. Schweppes is available to warehouses, to three chains in our area. Schweppes is available to them at a reduced price; how much, I do not know.

I do know this: The shelf price on the shelf for these three chains is the same as every other chain in town and is the same as if I had

Mr. Corwin. I might add one other thing in regard to Schweppes. In our area, the Portland company that bottles it is in one-way

packaging; we are in returnable bottles.

Consequently, there is a difference in price on the shelf. We are lower priced by virtue of the returnable bottle. And the flow of the returnable bottles would be chaotic if it were free interchange between the two territories.

Mr. Bangert. Well, each of you make the point that you do have exclusive territories and the size of your territories differ, but I believe it runs from 170,000 to 200.000 people, and within each of those territories, of course, you are protected from competition from that particular product that you are handling.

And I guess, in that sense, there is a protection offered to you. But each of you also are sitting right close to an adjacent city. For example. Mr. Corwin is sitting right across the river from Portland.

The Washington distributor is sitting right close to Pittsburgh. And the Greeley, Colo., distributor, Mr. Gates, is sitting close to Denver.

Now, each of these areas, I would assume, has more population than either of the many of the territories that you are confined in, so that would it not be a two-way street? Could you not, without this bill, be able to offer competition in Portland or in Denver, or in Pittsburgh ?

Mr. Corwin. I would say no because of the transportation, the investment that we would have to make in order to go over there.

In my opinion, it would not work.

Mr. Cameron. Plus, I think you might want to consider this point in his particular instance. I think most of the major chain-buying headquarters are in the bigger cities. Let us face it, we do not have the ability, the contact ability, that the bigger plant has with those chains. I believe Mr. Gates will tell you, that the buying headquarters in his area are in Denver, and they are right adjacent to the bigger city bottlers.

Once again, that is a real problem. But, as you know, it would not be very long before a supermarket chain or some big warehouse operation itself, would probably acquire a franchise. You know it, and

I know it.

After all of our hard work, after all of the years in creating the demand for our particular product in our territory, that supermarket chain would be canning along some interstate highway at a high rate of speed which we cannot match because of our finances, and I just feel that we would not be in the ball game. Believe me.

Mr. Bangert. Well, in the areas where we have had little experience so far, for instance, this morning Mr. Meijer, that is an independent chain owner, indicated that in milk products he buys from very small dairies in truckload lots. He does not go to the big national

dairy accounts.

We also find that in the products that were being shipped into the Los Angeles area, that they came from very small bottlers, one who is confined in a territory of 20,000 people. And the other one from Denver, Colorado Soda Hut, that I mentioned—in Boston—today, is purchasing their product from small bottlers and then shipping into the Boston territory.

So that the experience so far would indicate that when people are

getting price, they are getting it from the small bottler.

Mr. Cameron. I would think that would be a temporary situation, and I think if you would analyze it, it also would be a nonreturnable

situation and the returnable bottle would not be considered.

Mr. Corwin. I would hate to be in that kind of a situation. Where I was a small milk producer supplying one large chain and had geared up for that kind of production. Small as he might be, he is still going to have to make good investments in his business to create the productivity for the volume of those 23 stores.

And next year at contract time have that man say to him, "We can buy it for 2 cents a bottle less, will you meet that price or else?" I think this would be most unfair to that small milk producer, and this has happened in these United States. And it has happened, also, in

the soft drink industry.

Some of the small bottlers cannot match the dollars of the giants. We do not intend to. We are able, capable of taking care of our own franchise territorics, and the consumer has prospered because of it.

Mr. Bangert. Regarding the consumer and getting into the area of prices. I wonder if I could get from each of you, if you are in cans, some idea of what your wholesale price for 12-ounce cans per case is!

Senator Hausky. Counsel suggests if you do not have them readily available that you can supply them for the record and for accuracy and for completeness.

Mr. Cameron. Our can price in Washington, Pa., is \$3.15 a case, for 12-ounce cans. We do have a quantity discount available to each and everybody in our territory, if so desired, at a hundred case drop, at \$2.90 a case. That is our price.

Mr. Gates. In answer to your question regarding 12-ounce cans,

our price is \$2.75 for a case of 24.

Mr. Corwin. Our price, in Vancouver, Wash., is \$3.45 for a case of 12-ounce cans. We discount price to anybody at \$3.10 a case per hundred cases; 50 to 99 cases is \$3.20.

Mr. Bangert. I guess if I was a soft drink drinker, I would rather drink in Greeley, Colo., because it is quite a difference in price, really. And you wonder, you know, where does the consumer stand in—

Mr. Corwin. If I lived in Greeley, Colo., and all of the people were living there, and you had all of the material costs, all of the labor costs that are elsewhere in these United States, the price might

not be that way.

Mr. Chumbris. If Mr. Bangert will yield, we had some hearings 2 years ago on high hospital costs. In North Carolina, the scale per hour wage was \$1.35 minimum wage. In New York, it was \$2.80. But in Carolina, you could get a hospital bedroom for \$35 to \$40 a day; in New York you are paying \$115 a day, so it makes a difference.

I imagine the difference is the same with different products in different parts of the country in health costs or automobile costs or

soft drink.

Mr. Corwin. Our minimum wage is around \$5.15 an hour.

Mr. Bangert. I guess in Boston—and I do not know that that is necessarily a low-cost area—but again, Soda Hut is buying there for \$2.40 per case for Coke cans, and \$2.32 per case for Pepsi cans.

They are retailing them for \$2.79 a case.

Mr. Corwin. It must be an individual situation within that area. There are no two areas within the United States, market areas, that are absolutely the same. We have tried to make comparisons with our small operation with other operations across these United States in the time I have been in the business and the comparisons are very difficult to make.

Mr. Bangert. Perhaps the difference is in Boston they buy on a

warehouse basis and not on a store-to-store delivery basis.

Mr. Corwin. Well, that is a part of the business, that is true. But in our area, we have 1,240 accounts of which there are only 200 takehome or grocery store accounts. And out of those 200, there are only eight national chains and 42 of what we would call area chains; that is, four or more stores independently owned.

But there are service stations, restaurants, cocktail houses, garages, every other kind of place that will sell a soft drink. And, as you gentlemen know, you can buy it anywhere. And that is exactly the way we want it. And this is our distribution system. It is just not

entirely up to the grocery store.

In our delivery to the grocery stores and the chain stores, we have a multitude of distribution problems and we cope with them within

our business and profit by it.

Mr. Cameron. It just does not include cans, sir; it includes the returnable bottle, small and large, and we still feel we are very competitive in the returnable bottle business and are trying to the fullest

degree to create and maintain the returnable bottle business to every account, large or small; not just cans, not just one-way bottles.

Seventy percent of our business in our particular territory is still returnable bottles. We show you our desire to create and hold on to this returnable bottle business. We just recently, within the last 3 months, because we thought it was a good convenience and good idea, put on the resealable cap on the 16-ounce returnable bottle, and this particular move cost us quite a few dollars.

In actual case cost, it cost us 7 cents a case more to buy the aluminum cap than it does the regular crimp crown, but we did not—and I repeat—we did not raise the price on the product because we still want to push the most ecological package we can in our area, and that

is the returnable bottle.

We are in one-way cans; we are in one-way bottles for survival because it is part of the market and we want to be part of all segments. But I think the emphasis has been here, that I have noticed this morning, from the supermarket gentleman who talked, all on the supermarkets. That, really, in our territory, only represents 30 percent of our business on the outside.

So if I lose that 30 percent, which I will—take it from me—if we lose our territorial restrictions and I lose that 30 percent business, it is going to make the rest of my business just that much more expensive to run. Therefore, I will end up, probably, having to raise the price to the other guy, to the other accounts, and it is going to be the domino theory; the next thing you know, we will be down the drain, and all the work.

In our instance, we started our plant in 1889, by my grandfather. In our instance, where are we going to be? And we provided the consumer—one thing you have got to remember—with the returnable bottle.

Right today, ounce per ounce, when I came into this business out of college in 1950, it is cheaper to buy Coke ounce per ounce right now than it was then because of packaging changes. And this is a fact.

So, do not—please, in your thinking about this, remember, there are more segments to this soft drink business than just the big supermarket. Because, I will guarantee you, he will gobble up the small bottlers as fast as he can, and he does not know his warehouse cost anyway.

If he had to go to all cans—now he is getting door delivery—I do not even know that they know their own costs in items they handle in the stores in the warehouses. If they had to handle all their soft drink needs into their stores, then let them tell you what their cost

would be.

They would be up so high. It would not take long to where their

price would be up higher.

So all I am saying is that like Mr. Corwin and Mr. Gates, represent the soft drink business as it is. We have worked in it all of our lives. We could show you callouses on our hands. We are not executives, we are not lobbyists, we are just normal everyday people and we represent 9944/100 percent of the industry, not a few people that do not agree with us that are in this business—and I do not want to call them by name because they have not worked all of the territories that they have to do the job in their own territory.

And this is our life. We have benefitted the consumer and we have benefitted the community in which we live with our production facilities, with our distribution facilities, and we are a part of the com-

munity.

Now, the FTC comes along and says. "We want to eliminate you." And I always thought the FTC was to protect the small businessman. We are small business and we have a plant; we are proud of it; we have people who work for us, and we contribute to the local community taxwise. Federally, we—we just gave money to the local YMCA for the building.

We will not be able to do all of these things. We will be out of business in a very short period of time. Do not let anybody kid you, if this territorial restriction thing is eliminated, the three gentlemen you see

here, we are done as far as soft drink plants are concerned.

We cannot compete against the big boys. We cannot compete against the supermarkets or the big metropolitan plants. I also value my own territory and if I want to expand, I will buy somebody else out at a fair market value.

Senator Hruska. We have been joined by the senior Senator from

South Carolina.

When Mr. Bangert finishes his questions, Senator, we can call on you or we can call on you at this time, if you prefer.

Senator Thurmond. That is all right. Just go right ahead, Mr.

Chairman.

Senator HRUSKA. Have Mr. Bangert finish?

Senator Thurmond. Yes.

Mr. Bangert. Again, you know we had two small bottlers in during the last set of hearings and one will be coming in during this set of hearings that have different views than you do. Perhaps it is because they have more of a faith in their ability to compete in the free enterprise system.

But what they tell us is, "Do away with our territories and we will go out and we will hustle and we will take accounts away from the big boys." And each of those individuals did just that until the syrup

company cut off their supply.

Mr. Corwin. I thought that they had developed their own territories. My personal opinion is, I do not know too much about their territories, but I have been in the small territory and I know what it takes to develop it; a lot of hard work, long hours, and perseverance.

Mr. Cameron. I do not think they are being realistic, sir. They may exist today, but they will not for long. It is my considered opinion, I think they will be gobbled up in such a quick time, they will be yell-

ing "uncle" before too long.

They represent such a fantastically, unbelievably, small minority in the soft drink business—I will bet you in all of western Pennsylvania, there is not one bottler that even thinks as these other gentlemen think—these people from California and Denver, Colo.

Mr. Bangert. Realistically, do you think that Mr. Foster, who is sitting out there with a population of 20,000 people, has a chance if he is limited to 20,000 people that he can sell to, to grow and become more efficient and to take advantage of technologies, skilled persons!

Mr. Corwin. I do. He bought it under that pretense, and there is one in Elko, Nev., that has a 7,000 population with 15,000 in the marketing area who seems to be doing pretty well.

Mr. Cameron. I think there is a story behind Mr. Foster and I would never want to degrade any person in public. I think, perhaps, if you give me 20,000 people, and I would rather have more—do not misunderstand me, I realize he has got a problem, but if he really energetically had worked at the territory hard, he would have had himself a nice little territory, either to continue on with himself, or he would have had a valuable piece of property and a business that he could get just value for.

Right now I have got a valuable—we have got a valuable family business. If we want to, we can sell out for a fair market value and get what we have put into that business over the years, developing it

to the extent that it is.

But take away the franchise territory, why would you want to buy us when you can come in and swamp us over and take it away from

us by forcing business? This is what I am saying.

Today we have got something because we work; and while we work at it. I want you to know for sure that we have always had the consumer in mind. The fact of the price on our returnable bottles is low shows that.

That is all I am saying. I think that their views are very unrealistic, and I am telling you right now, in a couple of years, they will be

velling "uncle" so fast it will make your head swim.

Mr. Bangert. Now, we have heard, during the last set of hearings, that with the interbrand competition, you really do not need intrabrand competition.

Now, as I understand, Mr. Cameron distributes products for four syrup manufacturers. Mr. Gates and Mr. Corwin apparently distribute for six sirup manufacturers. Now, I wonder if just this combination

doesn't at least eradicate some of the interbrand competition?

Mr. Corwin. There is intrabrand competition. Not by us, but by the grocery stores, the fountains and the other promotional businesses in our territory. You can buy on certain weekends certain special prices in certain grocery stores—Pepsi or Seven-Up—at a lesser price than you can from other stores. There is intrabrand competition.

But the interbrand competition is fierce in the cola field, in the lemon field, in the orange or the root beer as a broad-based product.

And I think you have to consider this.

Mr. Bangert. If you are distributing for six syrup manufacturers, realistically, how hard are you going to compete with yourself?

Mr. Gates. Sir, there is more interbrand competition today than there has ever been in the 24 years that I have been in business. I have items that my competitor has. The name is different. The flavor is the

He is constantly trying to gain ground for his products, as I am for mine. There has been more of this, and there have been more price deals-if you want to put it in this light-even in the last 7 years than

I have ever seen before.

Mr. Corwin. In our territory, it would be impossible, practically impossible to get the volume of business with one product. The reason for our having six-and we will take seven or eight if we can get them—is to get the volume, cases per truck, to promote our total business and to promote in the area in which we serve.

In so doing, the consumer will benefit.

Mr. Cameron. If we didn't have these products such as Sprite, Fresca and Tab—we put them on for the same reason Mr. Corwin did, to increase our total volume. By so doing, we have also increased the competition within the soft drink industry, in total, within the territory; and interbrand takes over and governs the pricing of the packages themselves.

This is why we are so thoroughly convinced that interbrand will control the price of the product. I mean, you know, I am not going to sell any higher. If Mr. Corwin and I were in competition, I'm quite

sure we would have a good time going at each other.

Mr. Bangert. I am not trying to be facetious. I really am not. But do you sit there, you know, with one hat and say, "Okay, I have Tab, and I am really going to give myself competition with Fresca this week"?

Mr. Cameron. Two different products completely, sir. One is a cola and one is a grapefruit. Two completely different tastes. But they do appeal to the sugar-free market, true. But they are two completely

different tastes.

There might be some people who like a cola over a diet grapefruit, but I do not think there is any comparison there. Sprite goes against 7-Up, and Dr. Pepper probably—if you want to know the truth—probably in some instances competes with my own Coke.

Mr. BANGERT. So you don't think that they are the same product and,

therefore, they are not in competition.

Mr. Cameron. They are in competition. Everything that is sold is in competition, whether it is an iced tea mix, lemonade, or any flavor.

It competes for the dollar of the consumer.

So I consider that everything that is consumed—down your throat is competition to Coca-Cola. What we have done all these years, and what these gentlemen have done, is, with the blood and the sweat and the tears, by merchandise decisions have tried to promote and push to the front our leading brands, which in his case is Pepsi and 7-Up and mine is Coca-Cola.

This is what we have tried to do.

Mr. Chumbris. Mr. Bangert, would you yield at this point? Recently, during the recess, I went to visit some small bottlers in

Recently, during the recess, I went to visit some small bottlers in North Carolina and nearby Virginia. I went to each of them—Coca-Cola. Pepsi-Cola, Royal Crown, Canada Dry, Seven-Up, and Dr. Pepper.

I asked a series of questions that came out of the first series of hearings. These people were unanimous in agreement that they need the exclusive contract; but on this particular point, one of them stated

what others have said also, and he put it this way:

A franchisee, to be profitable, if he has a problem of volume of cases sold, must either, one, raise prices: two, increase sales: three, increase efficiency; and, four, deliver to more customers per mile per truck. Three brands on the same truck makes this possible.

Do you agree with that statement that was generally given in North

Carolina?

Mr. Corwin. You couldn't have it any other way; and I have a typical set of routes here that I brought along in case anybody would like to look at it.

What our routemen do on a typical day in servicing the various accounts that we serve, cases that he sold—and I am not about to say that we won't disclose anything we have as far as that is concerned. We are a private company. My profit and volume—I am not afraid to mention anything that we do in defense of what I feel is just, and I feel that the territorial agreement is just.

Mr. Cameron. May I bring up a point here? It seems to me to be

important at this stage.

You mentioned the production efficiencies and, as we all know, there are various laws that are coming out, such as OSHA and in trying to be efficient in your plant, we are at the stage in our particular operation where we are planning some production changes to become more efficient, No. 1; and to comply with the laws that are on the books.

That's what we have always tried to do.

Now enter into this the FTC thought. This is going to take a lot of money from us. You know, it almost makes you sit back and think whether you should really go ahead and make this investment; you know, you are gambling. Should you go ahead and put this money into your business now when in reality, maybe in a couple of years from now, the FTC is going to come along and take away these territorial restrictions?

It really is a real hard thing for us to consider what we are going to do. Probably it is going to cost us upwards to \$70,000 or \$80,000 to make the changes that we want. Now, should we make them or should

we not?

That is why we are here today—I am here today to ask for the legislation that confronts the House now and the Senate which will give us a little security. We feel so strongly about it—whether we should invest the money.

Mr. Bangert. I have just one more question. Mr. Cameron, I wonder whether or not recently have there been any restrictions put on your syrup supply or your supply of cans by either Coke or Dr. Pepper!

Mr. CAMERON. No, sir; indeed not. No, I have never had any, no

problems that way.

Mr. Bangert. Do you think that if you, by chance, were to sell to a big warehouse that was shipping into Pittsburgh, you could get enough syrup?

Mr. Cameron. Sir, I would not sell to a warehouse that was shipping into Pittsburgh without—I would not do it. I respect my franchise

lines. This is how I live.

As a matter of fact, just before I came here I had an opportunity to sell some canned Coke into Beaver, Pa. territory to a county fair.

I picked up the phone. I called Mr. Kasen at Beaver, Pa., who runs a plant the same way I do. I said, "Can you take care of this account?" I don't want that kind of business. I will develop the business in the

territory that I have worked and lived and abided by all my life. I do not need to go outside of my territory.

If I want to go outside, I will go over and consider buying a territory. I would not deliver to a warehouse knowing they deliver to somewhere outside my territory. I would not violate my contract. No, I would not do it.

Mr. Bangert. What you are saying is you would not compete with

the fellow in the adjoining territory?

Mr. Cameron. No. I am not; sir. I am saying I would not violate my territorial franchise, because if I sell to that warehouse and I know that he is delivering into Pittsburg territory with my product, I do not think that is right. That violates the franchise.

By the same token, I would be screaming like a stuck hog if he came into mine. That is what is so confusing about the California

situation.

Mr. Bangert. I have no further questions, Mr. Chairman.

Senator Hruska. Thank you, Mr. Bangert. I have just one question, and then I will call on Senator Thurmond.

Mr. Corwin, you have 1,240 accounts. How many of those are super-

market and big food store businesses, approximately?

Mr. Corwin. There are eight national chains.

Senator Hruska. Eight national chains. What percentage of your sales?

Mr. Corwin. Thirty-five percent.

Senator Hruska. Thirty-five percent. Now, referring to the statement of Mr. Gates, his sales to chain stores and supermarkets represent 53 percent of his volume; and in the case of Mr. Cameron, 25 percent of the total business would be specified as supermarket or big store business.

Now. I understand that this would be the chief essence of your argument—that if there were not territorial sanctity, if there were not territorial protection, the big cities just would come into your area and take away, by a concentrated effort and perhaps appealing to the national chain headquarters or otherwise—whatever means they could legitimately use—they would take away the 25 or 30 percent of the total volume, or the 35 percent of that volume or the 53 percent of that volume represented in the bulk, highly profitable accounts.

Those accounts are profitable because, per mile travel and per

hourly labor invested, the unit cost per case is relatively low.

If such a thing would occur, each of you would then have left only those higher priced service calls with larger price per units to the many, many accounts, each of which has a small percentage of the business.

It is the effect of that result that leads you to think that you have to have some protection on territorial rights. Do I get that argument

fairly closely?

Mr. Corwin. Yes, Senator; and in my testimony I have a statistical sheet on the back, and the eight national chains and the 42 area chains indicate 35 percent of my total sales. You are absolutely right in your conclusion, Senator.

Senator Hruska. And it is there that you do not have the unit costs, but it would stand to reason that if there were a bulk delivery in these larger stores—

Mr. Cameron. That is correct.

Senator Hruska (continuing). The cost per unit for servicing and delivering would be much smaller and, therefore, more profitable.

Mr. Cameron. Any time you sell, if you sell x number of cases, if you could sell "x" plus, then your whole total cost per case is cheaper. If it was x plus, plus—you know, the more you sell, the bigger increases that you can get are going to be the profitable ones, which makes your entire line—that you can keep your price down.

Now, if we lose the volume at the supermarkets, that is going to be good volume I have lost. The remaining packages that we have, if we are going to lose this, we will probably have to raise prices on those packages; and those are the packages that we deliver to the normal "Mom and Pop" grocery store, to the little service station, to the

bowling alley.

Senator Hruska. Then I would suggest this: There is so much effort on the part of so many people to have consumer protection, take care of the interests of the consumer and so we have about 256 agencies of Government now looking around after the consumer. It costs the consumer quite a little money to have all those agencies manned and in operation.

Now, we are going to have a super agency, a Consumer Protection Agency. Now then, the point that I made about the raiding of your respective territories, with these big accounts, would mean one of two

things, would it not?

You would either have to get out of business, or you would continue servicing the residue of your small accounts, with a necessity of increase in their price per unit, because it would be more—the more expensive units would be concentrated in your territory.

Is there ground for such a belief and such an observation?

Mr. Cameron. Yes, sir; definitely. Mr. Corwin. Yes, sir; there is. Mr. Cameron. No doubt.

Senator Hruska. In making that suggestion, I have in mind, primarily, the consumer. There is so much concern about the consumer. Often hearings like this are taken to be for the benefit of the bottlers or for the filling station operator or for the manufacturer, the truck company.

In the last analysis, whatever the service agency is—whether it is a distributor or manufacturer—unless he can deliver to the consumer

efficiently and well, he is not fulfilling his mission.

If it is done at an extraordinary price or at a price higher than he is now getting it, then there ought to be some concern of legislatures to look after the consumer, too.

That would be the views, tentative as they are, of at least this one

Senator.

Mr. Cameron. Thank you, sir.

Senator HRUSKA. I would like to pursue that, and will in due time: however, now I would like to call on the distinguished Senator from South Carolina, Senator Thurmond.

Senator Thurmond. Thank you very much, Mr. Chairman. I do

not have but just a couple of questions to ask.

As I understand now, under the franchise system which is in operation, you have a definite territory for Coca-Cola, Sprite, or whatever it is. Now, you have an agreement with the Coca-Cola Co., to give you that territory; is that correct?

Mr. Cameron, Yes; we purchased our franchise.

Senator Thurmond. Did you have to have another agreement with Sprite or every other company you represent?

Mr. CAMERON. Yes, sir, that is correct; although they do follow our

Coca-Cola franchise.

Senator Thurmond. Can you get franchises from all the dispensers of soft drinks if they would give you the franchises?

In other words, could you be the sole distributor in an area for all

soft drinks, or all the

Mr. Cameron. Not for all, sir.

Senator Thurmond. They are generally divided among several people. For instance, the competition you have among other soft drink people in your territory—

Mr. Cameron. What competition? Well, the Royal Crown Bottler,

Pepsi-Cola—you name it, we have so much competition, Senator.

Senator THURMOND. You have Coca-Cola?

Mr. Cameron. Coca-Cola, yes, sir.

Senator Thurmond. Somebody else has Pepsi-Cola, and somebody else has—

Mr. Cameron. That is correct. Somebody else has Royal Crown.

Somebody else has Seven-Up.

Senator Thurmond. Would it be possible for you to get all of those?

Mr. Cameron. No, sir.

Senator Thurmond. It is not possible? Why?

Mr. Cameron. It just is not possible. The franchise agreement— Senator Thurmond. Does Coca-Cola prefer to have their own dealer to push their own product?

Mr. Cameron. No; I can have other products. In my particular instance, I handle my own flavor line called Cameron Beverages, which is not affiliated with the Coca-Cola Co., in any regard.

I also handle the Dr Pepper which is not. But I cannot handle Pepsi-

Cola, which is in direct competition with Coca-Cola.

Senator Thurmond. Now, you would have to choose whether you would handle Pepsi-Cola?

Mr. Cameron. That is correct, sir; right.

Senator Thurmond. None of the companies have an agent like you in the same territory handling, say, Coca-Cola and Pepsi?

Mr. Cameron. No, sir.

Senator Thurmond. So you really do not have a monopoly, do you?

Mr. Cameron. All we have is—oh, no, believe me. If it is a monopoly,
I have not known about it all these years I have been working.

Mr. Corwin. There are over 200 items.

Senator Thurmond. If anybody did not like your drink, they could choose the competitor's drink?

Mr. Cameron. Definitely, sir. They can choose it by taste. They can

choose it by price.

They can choose it however they want to. They have the freedom of choice and location. They can buy it wherever they want.

Senator Thurmond. So there is no one dealer in any territory in the United States that you know of that has all the soft drinks?

Mr. Cameron. No. sir.

Senator Thurmond. And they would not be under the present system?

Mr. Cameron. No. sir.

Senaor Thurmond. Now, if you did not have a territory allotted to you, then would a Coca-Cola agent, for instance, two States away or one State away or in another part of your own State have a right to come in and sell to the supermarkets and all the stores that you sell to?

Mr. Cameron. That would happen.

Senator Thurmond. Under the present system, do you have, for instance, in your territory, do you have the exclusive right to sell to people in that territory any particular brand you are handling, like Coca-Cola, Pepsi-Cola, and so on?

Can your markets buy it from anybody else besides you?

Mr. Cameron. No. The only people who can buy it from Coca-Cola in our territory is the fountain division, fountain syrup is available. It can be sold by us if we so desire, or it could be sold by any wholesale jobber. For bottled products I have the exclusive right for Coca-Cola in a given territory; yes. The same with Dr. Pepper. The same with Sprite.

Senator Thurmond. In other words, that keeps some big fellow in the State from hogging or monopolizing the whole Coca-Cola business

in supermarkets—the way it is now?
Mr. Cameron. That is right, sir.

Senator Thurmond. Would you not probably have a bigger

monopoly if that were not the case?

Mr. Cameron. I do not think there is any doubt about it. I think if you made this change, they would control the soft drink business.

Senator Thurmond. If they could buy for the whole chain from one place, it might get sent cheaper, and yet that would help to destroy some small businessmen who are in this business and who could not survive without handling those brands.

Mr. Cameron. That is right, sir. I agree 100 percent.

Senator Thurmond. Is that correct? Is that the way you see it?

Mr. Cameron. Yes, sir. There is no doubt about it.

Senator Thurmond. I think that is about all the questions I have. I noticed this gentleman from North Carolina made the statement that without exclusive territories, the small businessman cannot survive. The big one would absorb the smaller ones. Do you agree to that?

Mr. Cameron. Would you repeat that, sir?

Senator Thurmond. The statement he made was, without exclusive territories, a small businessman cannot survive. The big ones would absorb the smaller ones.

Mr. Cameron. That is correct.

Mr. Gates. Yes.

Mr. BAKER. That is true.

Senator Thurmond. In other words, if you did not have exclusive territories, you agree to that?

Mr. Cameron. Yes, sir.

Senator Hruska. The signal indicates we have a vote in progress. Can you conclude?

Senator Thurmond. Mr. Chairman, thank you very much. That is

all the questions I have.

I want to ask you this: Which soft drink has the least sugar in it?

That is off the subject, but I just want to know.

Mr. Cameron. Do you want to have me answer that?

Senator Thurmond. I would like you to answer that, yes. Mr. Cameron. I am partial. You may get mad at me. Tab.

Senator Thurmond. Tab has the least sugar? I have been reading so much lately about two things not being good for you—the research they have been carrying on—and one of them is refined sugar and the other is refined white flour.

This research indicates those are not good for us. I drink small drinks—soft drinks. I want to drink the one with the least sugar in it. I want to find out which one has the least sugar.

Mr. Corwin. I think we need more research.

Senator Hruska. If we get into the calorie business, we will miss our vote, so we want to refrain from doing so.

Senator Thurmond. Thank you very much.

Senator Hruska. Thank you, gentlemen, for being here.

Mr. Baker. Thank you. Mr. Cameron. Thank you. Mr. Corwin. Thank you. Mr. Gates. Thank you.

Senator HRUSKA. We will recess now until 10 a.m. Thursday morn-

ing next in the same committee room.

(Whereupon, the hearing was adjourned at 11:55 a.m., to reconvene Thursday, September 14, 1972, at 10, a.m.)



### EXCLUSIVE TERRITORIAL ALLOCATION LEGISLATION

### THURSDAY, SEPTEMBER 14, 1972

U.S. Senate,
Subcommittee on Antitrust and Monopoly,
Committee on the Judiciary,
Washington, D.C.

The Subcommittee on Antitrust and Monopoly convened in room 2228, New Senate Office Building at 10 a.m., Senator Edward J. Gurney presiding.

Also present: Senator Strom Thurmond.

Starf present: Charles E. Bangert, general counsel and Peter N. Chumbris, chief minority counsel.

Senator Gurney. The subcommittee will come to order. The first witness here under subpena is Mr. John L. Uzzo.

## STATEMENT OF JOHN L. UZZO, VICE PRESIDENT, EUNICE SEVEN-UP BOTTLING CO., INC., EUNICE, LA.

Senator Gurney. Do you have a statement to make?

Mr. Uzzo. The same one that I sent in. What I am here for is to not contest the legality of franchises, per se, which I have issued or claimed—but to question the legality at one time whether our franchise granted us the right to do business as we should, you know, free

enterprise.

We had an opportunity at one time to sell to a national chain that held a warehouse within our territory and we attempted to sell to them but our parent company told us that they could not because they would be selling out of our franchise territory, which as far as we were concerned, meant nothing because they were buying in our franchise territory and we had no control over what they did with it, if they poured it out or drank it all within our territory.

We simply were within our right by selling it to someone who requested it within our franchise area and we felt that we had no reason

to question where they sold it.

Senator Gurney. I have your statement here. Would you like this included in the record at this point?

Mr. Uzzo. Yes.

Senator Gurney. Then it will be so included.

(The document follows:)

EUNICE SEVEN-UP BOTTLING Co., INC., Eunice, La.

Our company had the opportunity to sell a food store chain, Seven Up in cans. This chain had a warehouse within our franchise territory. They would pick up the merchandise in their truck from our plant and deliver it to their ware-

house, where it was distributed to their store locations throughout the surrounding area. Some of the store locations were obviously in the other franchise territories because complaints were filed with the parent company in St. Louis and our company was reprimanded and told to stop selling at once.

Our complaint is not with the fact that we should be allowed to sell out of our franchise, but we do think we should be able to sell to whomever requests

it at our door (which is within our franchise).

While realizing the franchise does protect us, we feel that we could realize greater capital growth if we were not so confined.

JOHN L. UZZO, Vice President, Eunice 7-UP Bottling Co., Inc.

Senator Gurney. Do you have any questions?

Mr. Bangert. Yes.

Mr. Uzzo, could we have just a very brief description of the business that you are in, how long you have been in business, what the size of your territory is, that type of information?

Mr. Uzzo. Yes.

My father originated the business back in 1925, which is about 47 years that we have been active and we are in a small five-parish area in south Louisiana. He was in business before Seven-Up was originated and that was the first franchise that he worked under.

We have a buying capacity population power of about 200,000 people. He originated, at that time, an original business, his own line of flavors which, of course, has carried him financially through the years. He has had three other franchises in that length of time, but Seven-Up has been the most powerful one.

But I think that his money was not made and his business did not flourish on success of that alone. I think that it took the profit ratio of his private line of flavors to carry him through the years and assured

him a good ratio of profit.

So I think, perhaps, the most important thing here is the fact that we have built this business on free enterprise and doing what we wanted to do where we wanted to and that no one told us where we could sell our line of flavors. And we feel that if we could also sell Seven-Up as well anywhere we wanted to, it would be survival of the fittest. I do not think that we would have to be concerned with our parent company protecting themselves by having control over small bottlers.

So we feel that if we could just expand our business as we see how, it would be our opportunity and if we lost, it would be our burden.

Mr. Bangert. As I understand it, what you were doing was selling Seven-Up to a chainstore that had a warehouse in your territory.

Mr. Uzzo. Yes.

Mr. Bangert. And that chainstore then shipped the product out-

side of your territory to their various stores.

Mr. Uzzo. That is right. Actually, their chain is national. The warehouse which was in our territory was only delivering for areas through our State, you see, and only in fringe areas of other people's franchise territories. The problem was not that it was going, you know, from New York to Miami to California. That was not it at all; it was in our outlying areas.

Seven-Up restricted us to two parishes within our State, and what this chain was doing, was delivering to the parishes surrounding itjust the very borderline territories. And the parent company said no.

it could not do that.

Mr. Bangert. You, yourself, actually were not violating your territory in the sense of selling outside of it?

Mr. Uzzo. No; we were not. Of course, we immediately ceased sell-

ing upon recommendation.

Mr. Bangert. As I understand it, you were selling your own private brand to this chain.

Mr. Uzzo. Correct.

Mr. Bangert. Am I correct in assuming that the deal was that if they were going to pick up a half truckload or three-quarters truckload of your private brand, they figured they might as well finish filling up the truck with Seven-Up?

Mr. Uzzo. Yes, because they did sell Seven-Up in their stores throughout the territory and they figured, well, if they were going to send a truck out, they might as well go with a full load. It would help their profit margin and, again, bring it at less cost to the consumer.

This was the problem here but we could not do that and, of course, they could not use 800 cases of, say, just our private label because they had other things to sell as well in private label flavor lines, and in one instance, their own particular brand.

But they felt that Seven-Up would turn over, and they felt they would just go ahead and pick it up at the same place and we said no.

Mr. Bangert. Now, can you tell me how many bottles your plant can produce per day?

Mr. Uzzo. Bottles per day, we can go to a maximum of 3,000 to 5,000 cases per day with our equipment.

Mr. Bangert. And are you running at full capacity?

Mr. Uzzo. No, because sales don't warrant it. We would have to double our labor force because they are on the job anyway and they have to be guaranteed their 40 hours, you know.

And we could run, I daresay, double what we do now if we had the

opportunity to go out and get extra business.

Mr. Bangert. I assume when you had the deal with the chain, this did increase the capacity of your plant; you were able to utilize

better the capacity of your plant?

Mr. Uzzo. Yes. Eventually, it would have led into greater things. At that time, the original request came from that chain, to buy canned merchandise which, of course, we do not can in our plant ourselves. We get a truck in under the auspices of the Seven-Up Co. That is what was turned away.

Eventually, they wanted to and had requested at that time to get disposable bottles as well from us. We do put that up at our plant. They were in great quantity and moved rapidly off the shelves and

we added extra hours to our force.

Mr. Bangerr. You could have better taken advantage of efficiencies available to you?

Mr. Uzzo. Yes.

Mr. Bangert. We have heard that perhaps you and Mr. Alden and Mr. Foster, who testified before, are rare in the sense that there are no bottlers, really, except maybe you three in the country that oppose this legislation.

Do you have any feeling on that from your contact?

Mr. Uzzo. I do. I was noticing from some of the testimony in the past that most of the representation here is from parent company

people, people who are in an executive capacity of those firms. And I think that probably a lot of the small people—just to put it blundy—don't have the guts to get up here and tell you that they have a complaint because they have a private fear that they will be knockle-rapped again and they should not do this, and if this happens, they will lose their franchise and then what will happen when they do not have their protection?

Well, I think that what is happening is that the franchisers, the parent companies, are afraid that they will not have the control that they have over small people now, and I think that free enterprise is the most important question here. And I think that what we need

to do is just to get out and make a living where we can.

Now, the same thing happened in 1925 when my father started. They had absolutely no competition in the area that he chose to do business in. But at the same time, other people were granted the

opportunity to do it.

Now, if they had given him Seven-Up to go carte blanche anywhere he wanted to with it, he would have gone as far as he did with his flavor business. And up to this date, we go out into three to five extra parishes, any wholesale warehouse that wants our merchandise, we will get it to them.

Mr. Bangert. In your own private label?

Mr. Uzzo. In our own private label, right. But if we could take along something like Seven-Up, that is something they would be happy to have and know would sell quickly, that would be a much nicer door opener for us to get our label in. In new areas, they find out it is a good quality product and it will sell. We would be patting out the exact same amount of work energy and getting a better return.

Mr. Bangert. One of the things that has been mentioned during the course of the hearings is that if territorial facilities are not made lawful, the trend will be toward sales to warehouse accounts and the "Mom and Pop" stores, the bowling alleys, and gas stations, will dry

up.

Do you have any feelings on that?

Mr. Uzzo. I think that that is the inevitable end for this kind of business. The days of the truck routes, the delivery sales, you know, are on the way out. Like now, they are trying what is known in our trade as preselling—sending someone ahead to make certain that every arcount is called on, and then later having a delivery truck go by and fill those orders with the merchandise.

Well, the only problem with that, is the conglomerate competition, you know, they have warehouses and national chains now that have their own lines of soft drinks; like National as what they call Orchard Park, and the Winn-Dixie chain has what they call Chek.

And that is just isolated in the soft drink business.

Now, they had their own private labels of all other canned goods in the food business as well. It's the same thing with soft drinks, they have gone from cans now into disposable bottles, into 28-ounce, quarts, half gallons, everything from screw-type caps to snap-top lids.

And there is no way in the world, with those people having, you know, outlets all over the country, that they can produce one bottle of soda far cheaper than I can. So, naturally, they would be in the same capacity, you know, whether or not the "Mom and Pop" stores are

getting it or not, that is not the competition because the majority of the people are out buying it from supermarkets and easy shop-quick chains.

And I just think that there is no way in the world that you can continue doing business the way we did from 1925 to date. I think that we would have to devote all of our energies to selling in quantity to wholesale warehouses that can get rid of it and distribute it.

They are making the routes anyway; they are dropping off the mer-

chandise anyway; they might as well include our soda.

Mr. Bangert. Do you see possibly, of the alternate suppliers, for the small independent—

Mr. Uzzo. I am sorry, I did not hear you.

Mr. Bangerr. Do you see a possibility that although you might not be supplying the gas station yourself, there might be a void there that someone would come in and fill?

Mr. Uzzo. At that time, it was a glorious opportunity for someone else to go into business for their own—to institute a warehouse of their own from our company and call on all of the service stations and grocery stores that insist on buying it that way.

In our own business now, we could run that, in essence, to keep one particular route for just those things throughout our given territory

that we so choose to pass.

Mr. Bangert. It would seem to me that pehaps if you had one truck delivering several brands to a gas station or a bowling alley, you would have more efficiency in that respect than having six or seven, or

eight different trucks.

Mr. Uzzo. Right. People that you just cannot absolutely depend on because of the fact that they work on commission or guaranteed salary. They will work so much time in a day and if they decide they are tired, they will quit and go home. If they decide they do not feel like working on this particular account, they will pass it up until tomorrow. There is no control, absolutely none. You are at their mercy.

If you had someone else delivering those isolated one at a time stops, well then, that would not be your problem, you would be filling your

volume.

Mr. Bangert. One last area I would like to cover.

Again, during the course of the hearings, we have heard exclusive territories are necessary for the ecology argument, that unless you have exclusive territories, you are going to ultimately do away with returnable bottles and go to one-way disposable containers. And the argument runs, therefore, you will have more litter.

I wonder do you have any feelings on that?

Mr. Uzzo. Well, I cannot imagine even taking time with that because the consumer is going to buy what they want and they are going to demand what they want, you know, and they will do with it what they

want when they get it.

So I do not think that we, as developers and bottlers, have any control over that. Like if somebody decided, you know, they wanted a plastic hose to their kitchen, I am sure the soft drink industry will end up doing that for them, because everything is, you know, convenience, convenience packaging.

Mr. Bangert. Do you have any experience with respect to other returnables, why they are going down in terms of their being return-

able?

Mr. Uzzo. Yes. It is apparent being a much more convenient bottle than a returnable bottle because I think now, probably people are more oriented for convenience. They will not be concerned with the deposit that they have got extended into that item that they purchased, whereas, years ago, it was a nice incentive for a youngster to pick up empty bottles and return them back to the plants from which they came and gain that money.

But now, I do not know with our economic values the way that they are, everybody else has changed. We get little or none in return, whereas before, they used to make an average of, you know, 15 to 40 trips with returnable bottles back into the plant. Now, we are lucky if they are making three to five. That is the quantity that we have to buy per year.

So, naturally, we are far more interested in nonreturnable packages. Mr. Bangert. Previously, if I understand it, it has been an efficiency for you. It is not any longer an efficiency if you do not get that bottle back?

Mr. Uzzo. Exactly.

Mr. BANGERT. You pay more for that bottle than you would a non-

returnable bottle?

Mr. Uzzo. Yes, depending on what bottle it is and from which company. They run from 9 to 10 cents a piece. The price that you pay for nonreturnables is from 3 to 6 cents. So, actually, if they are going to throw something away, and they inevitably will, since they do not come back to us. I'd rather that they throw the 3- to 6-cent item away than the 9 to 10.

Mr. Bangert. I have no further questions.

Senator Gurney. Mr. Uzzo, how much percentage of your business

was in this food chain deal?

Mr. Uzzo. At the time, it was the second request we made from our parent company, so it would have probably gone from about, I would imagine, about 10 percent.

Senator Gurney. Of your entire bottling business?

Mr. Uzzo. Yes, we hoped it would have. I do not know that it would have because we did not do business with them.

Senator Gurney. This bill protects the small bottlers as well as large

bottlers with no discrimination here. Mr. Uzzo. Yes: I understand that.

Senator Gurney. How large is your territory?

Mr. Uzzo. We have two 7-Up parishes. Our private brand goes into five parishes. It is a parish system in Louisiana. What we do there with our private label is go everywhere we can. We go throughout the State and borderlines of Texas and Mississippi with ours, and we hope to get further away. We have a broker working with us now and we are going on as far as we can with anybody that will want it.

But with 7-Up, we are restricted to two parishes and the fringe areas of one additional one, so you could say a three-parish area, which

is about a 200,000 population area.

Senator Gurney. Did food chains stop buying from you because of

the situation?

Mr. Uzzo. No. The chain buyers wanted our products because it is not available anywhere throughout the territory.

Senator Gurney. What about 7-Up?

Mr. Uzzo. No, they do not buy that. What they will do is at their stores in our territory, our soft drink delivery truck will stop there and they will buy our products by the case.

Senator Gurney. Was your price different in the warehouse deal

than to the individual store?

Mr. Uzzo. No, sir.

Senator Gurney. I do not have any further questions.

Mr. Chumbris? Mr. Chumbris. No.

Senator Gurney. Senator Thurmond?

Senator Thurmond. No.

Mr. Chumbris. Mr. Chairman, I have one point.

Yesterday, we had three franchises; one from Pennsylvania, one from Oregon, and Washington has a plant in Portland and one from

Vancouver, and one from Greeley, Colo., I believe.

They were unanimous in the view that if a franchisee were to franchise his product for a warehouse for the chains, then that warehouse would spread it out in six, seven, eight, or nine towns within one State or possibly two or maybe three States.

It would take away from the business from those small bottlers to the extent that it would drive them out of business or in the words

of the one witness, Mr. Cameron, he says:

Now if we lose the bottling at the supermarkets, that is going to be good volume I have lost. The remaining packages that we have, if we are going to lose this, will probably have to raise the prices on those packages and those are the packages that we deliver to the normal "Mom and Pop" grocery stores, to local srevice stations and to the bowling alleys.

Then, Senator Hruska raised this point: He says—this is Senator Hruska speaking—

Now we are going to have a super agency, a consumer protection agency. Now then, the point that I made about the raiding of your respective territories, with these big accounts, would mean one of two things, would it not?

You would either have to get out of business, or you would continue servicing the residue of your small accounts with the necessity of increase in their price per unit because more expensive units would be concentrated in your territory.

Are there grounds for such a belief and such an observation?

Mr. Cameron. Yes, sir, definitely.

That is the problem that has been posed to the Senators who co-

sponsored this bill.

Mr. Uzzo. Yes; they are all isolated cases in every endeavor. I am sure of that. The reason I am here now is because we have the opportunity and the ability now with our size plant to have invested a lot of our capital into new machinery and equipment for building our output, and we can do that now.

And I think that Mr. Hruska was right when he said either I would have to go out of business or, you know, sharpen your edge, and that is it. And I think that that is exactly the problem here. I think that we should have the opportunity to go broke if we wanted to.

But let us go out and try to make our fortunes or let us go out and get out of business. If we do not have the power and the ability and the strength to stay, you know, solid, well then, we should go out of business. And I think that goes for anyone.

And that is what I want to be able to exercise, my right to get out

and grow or die, whatever the outcome.

Mr. Chumbris. Thank you.

Senator Gurney. Thank you, Mr. Uzzo. We appreciate your coming before the committee and testifying.

THE SEVEN-UP Co., St. Louis, Mo., October 3, 1972.

Hon. PHILIP A. HART,

Chairman. Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, Washington, D.C.

Dear Senator Hart: You wrote to me on September 19, 1972 requesting comments on several questions raised by the recent testimony before your Subcommittee of John Uzzo, Vice President of the Seven-Up Bottling Company, Eunice, Louisiana, regarding alleged activities of The Seven-Up Company in preventing Mr. Uzzo from selling 7UP to a chain store in the Eunice territory for transshipment outside the Eunice 7UP territory into the territories of neighboring 7UP bottlers.

The questions asked in your letter together with my answers are as follows:

1. Does the Seven-Up Company have an exclusive territorial allocation requirement in all of its contracts with bottlers which is normally and regularly

policed?

Answer. The standard franchise agreement for 7UP requires that the 7UP franchisee not "\* \* \* sell or distribute [7UP] directly or indirectly \* \* \*" outside a described territory. Occasionally we have received reports from our field personnel that the products of one 7UP franchisee are being sold directly or indirectly in a neighboring 7UP franchisee's territory. The practice has been stopped voluntarily when we bring it to the attention of the offending franchisee. Concerning the situation in the Eunice, Louisiana territory referred to by Mr. Uzzo, we learned that Mr. Uzzo was selling 7UP to a warehouse of a chain in Mr. Uzzo's 7UP territory which was being distributed in a neighbor's territory. When we brought this to the attention of Mr. Uzzo's father, the charge was denied. The Uzzos explained that only normal sales of 7UP were made to the chain: that deliveries large enough to justify transhipment to another 7UP franchisee's territory were not made. No further developments to our knowledge have occurred until the inquiry raised in your subject letter.

2. Does Seven-Up Company have such a contract with Mr. Uzzo?

Answer, Yes.

3. Does Seven-Up Company generally interpret its contract as to prohibit franchised bottlers from selling to customers located in their territories who may ultimately ship outside of that territory?

Auswer. Yes. You will note in the answer to 1 above that indirect distribution

of the product outside the franchisee's assigned territory is prohibited.

4. Does Seren-Up Company interpret this contract only as meaning that franchised bottlers may not themselves cross franchise lines and make sales in another franchisee's territory?

Answer. No.

5. Certain testimony has indicated that the syrup company does not police the anti-warehouse sale prohibitions for large franchised bottlers as stringently as for smaller franchised bottlers. We would like to have complete information as to your practice in this regard. Such information should contain, but not necessarily be limited to, information regarding the number of violations found by your company by size of bottlers, as well as the steps taken to assure that such practices would not continue. We also would appreciate learning what success your company has had in stopping these shipments.

Answer. Concerning the point raised in the first sentence, the cornerstone of our franchise relations with 7UP franchisees is the policy that all franchisees are treated exactly the same. No favoritism is shown one franchisee against another. Concerning the rest of this question, I believe the statements in the

answer to 1 above cover this matter.

We are aware that representatives of the chains and a few soft drink franchises, of whom Mr. John Uzzo is a rare example, support the concept that soft drinks should be distributed through warehouse deliveries to food chain outlets; that the prices to the chains will be lower in a warehouse delivery system than existing prices to the chains through sales from the trucks of driver-salesmen. This has been the position of the chains for many years. First, they do not like to handle returnable bottles. Second, they would like to control the display and stocking of national brand soft drinks more closely in order to promote the

sale of their own private brand soft drinks at the expense of the national brands. Our purpose is not only to protect the position of the 7UP brand vis-a-vis private brands, but to make certain that the personal contact between the driversalesman and the local manager of the chain store is maintained. The compensation of the deliveryman is in direct proportion to the volume of cases that he sells and delivers. Thus, he will want to maintain good relations with the local store managers and supervise the stocking, display, location and other factors involved in the marketing of 7UP to assure at least fair treatment of 7UP against private brands sold in the same stores. It is for this important reason that warehouse deliveries are resisted and a system of territorial integrity is preserved in the 7UP franchise business. It is not, as contended by opponents of the legislation, to support a so-called monopoly price on 7UP. There is abundant testimony and evidence to support the fact that competition is indeed extremely intense in the soft drink business. Removal of territorial restrictions in franchise relationships is not going to have any continuing effect one way or the

other on the price of national brand soft drinks to consumers.

The FTC has with obvious good intentions filed a group of lawsuits against the major soft drink franchise companies to eliminate territorial restrictions in their franchise agreements. The theory is that the territorial restrictions are anti-competitive and the removal thereof will lead to reduced prices on soft drinks to the consumer. To those of us who have had years of experience in the soft drink industry, the actions of the FTC are totally misguided. Should the Congress decline to adopt the proposed remedial legislation, and should the position of the FTC prevail, the only significant result will be a depression in the market for smaller bottling businesses. When franchisees, who have invested a lifetime of energy and money in a family business, get old and want to sell out, there are a number of alternative purchasers; i.e., younger members of their management, local investors, other bottlers, etc. It is obvious that the selling price of their businesses will be reduced if these prospective purchasers must be concerned about a larger neighboring franchisee running the smaller producer out of business through temporary price cuts and deliveries to chain warehouses located in the large producer's territory for transshipment into the smaller producer's territory. It is difficult for us to associate the FTC with a program having this disastrous effect on small businessmen.

Very truly yours,

The Seven-Up Co.
J. Stewart Bakula.

Senator Gurney. The next three witnesses are Mr. Jess Helms, Mr. Andy Rainey, and Mr. Harold Koon, from the National Institute of Food Distributors. Will you please come forward?

I see Mr. Thurmond is here from South Carolina. Would you care to introduce them to the committee? Senator Thurmond. Thank you, I would be honored to do so.

### INTRODUCTION OF JESS HELMS

Mr. Chairman, I have known Mr. Jess Helms for a long number of years. He is an outstanding citizen of South Carolina. His home is in Greenville, one of the fastest growing sections of our State. He is a businessman of integrity. He is a public-spirited fine citizen. He is a true patriot.

It is a great pleasure for me to introduce this outstanding civic leader to this subcommittee today. I am honored to present him at this time.

I might say that I have another engagement and shall not be able to stay through this testimony but I heartily endorse his testimony. I think it makes sense; it is very practicable and I hope the subcommittee will give the utmost attention to his testimony.

For those members who are not here today, I hope they will read Mr. Helms' testimony as I think they will be deeply impressed by it. This is a matter of great concern to our small business people throughout

the United States.

Thank you very much.

Senator Gurney. Thank you, Senator Thurmond.

I appreciate your taking your time to come down and introduce the witness to the subcommittee. We will certainly listen to Mr. Helms' testimony with great interest.

# STATEMENT OF JESS HELMS, CHAIRMAN, LEGISLATIVE LIAISON COMMITTEE, NATIONAL INSTITUTIONAL FOOD DISTRIBUTOR ASSOCIATES, INC., ATLANTA, GA.

Mr. Helms. Thank you very much, Senator Thurmond, Mr. Chairman

Of course, we are appearing here before this committee to recommend to you that you recommend to the Congress the passage of the Senate bill 3587.

I have with me two colleagues, sir, that I would like to present at

this time, and they will present part of our testimony.

On my right is Mr. Andy Rainey from Gulfport, Miss., who operates his own individual business in Gulfport and, on my left, Mr. Harold Koons from Bowling Green, Ky.

And Mr. Rainey will speak first, sir.

Senator Gurney. Go ahead, Mr. Rainey. Welcome to the subcommittee hearing.

Mr. RAINEY. Thank you, Mr. Chairman.

My name is Andy Rainey. I own and operate Coast Food Distributors in Gulfport, Miss.

I wish to speak in favor of Senate bill 3587. Unless this bill is passed,

I may lose the business that I have worked years to build.

One weekend, 14 years ago, I met with a group of small independent food distributors like myself in Atlanta, Ga. We met in desperation in an attempt to find a solution to our common problem. We were slowly but surely being put out of business by the large national concerns with whom we could not compete because of their mass purchasing power and their ability to market nationally advertised and accepted labels.

In fact, they were often selling their nationally advertised brands to our customers at prices under our costs. I am sure you can readily

see how critical that situation was.

This meeting resulted in our organizing the National Institutional Food Distributor Associates. We adopted the initials of our association, NIFDA, as our brand name, which is registered and appears on labels of our various products.

These products are sold throughout our individual member distributors, to institutions such as schools, hospitals, and restaurants throughout the country, NIFDA has now grown to 135 such member

distributors.

All of us individually operate our businesses, but we have the benefit of volume central purchasing and nationally advertised and accepted label and, most important of all, we are approaching the point where we will be able to effectively compete with big nationally owned and controlled businesses which were, only a few years ago, threatening our very existence.

It has taken our organization most of the 14 years to achieve some semblance of national distribution and because we have, for the most part, been busy teaching member distributors in new areas and sections of the country, there has been a minimum of intrabrand

competition between us.

So, up to this point, we have been able to devote our efforts to competing with big business and not anticipating such efforts by having to compete with each other. However, we have now reached the point where we must be able to give our member distributors specific marketing areas in order to finish establishing a strong nationally known and accepted label which will find itself capable in every respect of effectively competing with those of big, national concerns which are able to control their intrabrand competition through their own distribution system.

Otherwise, we cannot survive as small independent businessmen, since there is no way that we can compete with the labels of big business while at the same time competing with each other. Our big business competitors do not have to compete with their own labels, so

why should we?

The stockholders of a large, national corporation can see their funds expended in developing a market for its own label and know that it is protected from having other companies selling products under the same label which have not spent any money whatsoever in obtaining customer acceptance of such label, and thereby unjustly being able to reap profits from essentially what has been another company's investment.

As small, independent distributors without territorial protection for our NIFDA label, we cannot continue to expend our companies' efforts, time and money, to develop consumer acceptance of NIFDA products if our next-door neighbors can, at any time, start distributing NIFDA merchandise to the customers we have gained for the NIFDA label through our companies' efforts without any effort on their part other than merely offering the merchandise.

Gentlemen, NIFDA wants to compete with big business and it is the

public's interest that this be allowed.

In view of decisions by the U.S. Supreme Court, the Court has made it clear that organizations like NIFDA cannot give assurance to its present or prospective members that the marketing area in which they have expended or will expend time, effort and money in promoting their organization's national label, will be exclusively theirs for the purpose of distributing merchandise under such labels.

Although the Court has placed its sympathies on record, it has stated that the present law is clear and cannot be interpreted otherwise. And our recourse is to seek a remedy from you, the Congress,

and not from them. The law should be changed.

The passage of Senate bill 3587 would allow us to finally achieve the goals toward which we have been striving, to be able to effectively

compete with big businesses throughout this country.

The purpose of the antitrust laws is to assist in assuring the American public that they will be able to purchase in a free and competitive market. Senate bill 3587 will allow this organization, and many others like it, to create more competition in our markets. Otherwise, small independent businessmen like ourselves are

doomed. Big business will get bigger and the competitive market can only strengthen, I think.

Senator Gurney. Thank you.

Mr. Helms. Mr. Koon will speak next, sir.

Mr. Koon. Mr. Chairman, I operate Koon Food Sales, Inc., in Bowling Green, Ky., and was a charter member of NIFDA as was Mr. Rainey and Mr. Helms. We know what central purchasing and the ability to distribute a nationally known and accepted label has done for us and our business.

NIFDA has given us the ability to build strong, viable businesses within our marketing areas which are competitive with the big nationally owned and operated companies, companies which only a

few years ago were about to put us out of business.

NIFDA has allowed us to do this by giving us the following tools: Quality products prepared and packaged to meet the needs of our institutional customers such as schools, hospitals and restaurants; enforced quality control procedures; competitive pricing through central purchasing; forward distribution points closest to our individual businesses; national advertising; sales training seminars for our salesmen; customer services; and above all, a nationally recognized and accepted label.

By giving us all of these, NIFDA has allowed us, as small independent businessmen, to compete with big business. We have built our businesses on the concept that we would have something for the future and that the investment of our time, efforts, and money in developing this consumer acceptance was done so with the thought that the customers we obtained for NIFDA through these efforts would be our customers and the NIFDA label in the market, our label.

In most instances, the major asset of our business is this label. It represents, in many cases, our lifework. It is unthinkable to us that someone else could come into our market and take the customers which we have worked so long and hard to cultivate by no means other than

merely offering the same label.

It would have been impossible without the national association for me to develop in my market, which would be competitive with the big labels, a big business. The cost of building this label would have been prohibitive. By a reasonable estimate, it would have cost me at least a quarter of a million dollars to develop a label of the quality which we now have collectively produced.

There would have been no way for my little company to purchase in quantities large enough to have prices competitive with those of big business. I would have never been able to advertise my label by the means that national advertisers are able to use and to achieve for my label the position of prominence and acceptability that NIFDA's

national advertising program has given.

I should have never enjoyed the luxury of the forward distribution points which permits better inventories and money management nor could I have provided sales seminars for my salesmen to enable them

to have the expertise to compete with those of big business.

Mr. Chairman, none of these could I have had without this association. To perform these functions for our member-distributors we maintain a central office in Atlanta, Ga., which is staffed by 18 competent personnel who are dedicated to our 135-member distribuotrs.

We are here today representing those 135 distributors whose future existence depends on their ability to reap the fruits of their past efforts. Our member distributors have built viable, competitive, and local businesses under the free enterprise system that are in a position to render a valuable service to the American public by strengthening its competitive economy.

We cannot survive to assist in the competitive spirit of the American economy without the protection of the Senate bill 3587 would give us or grant to us the possibility of having a market which is ours to further compete with this big business, and also without the neces-

sity of competing with our own associates.

Aside from our existing members, without the protection of territories, we cannot secure the new member distributors from areas in which our association is not now represented which is essential for us to obtain in order for us to stay competitive in our industry. We could not grow. If we cannot grow, we cannot survive.

Passage of Senate bill 3587 is absolutely vital and essential to our

continued existence. We urge your favorable consideration.

Thank you.

Senator Gurney. Thank you.

Mr. Helms. Mr. Chairman and gentlemen, my name is Jess Helms and I own and operate Southern Foods, Inc., in Greenville, S.C.

I, too, am a NIFDA distributor and would like to make further comment on the statement of Mr. Rainev and Mr. Koon with respect to the urgent necessity of the passage of Senate bill 3587 as it relates to my business and to our organization.

As previously explained to you, sir, NIFD $\Lambda$  products are used by

institutional customers such as restaurants, hotels, hospitals, and

schools, and we are primarily institutional food distributors.

However, we find ourselves in the same position as the small independent grocery stores which have been fighting to survive the unfair competition thrust upon them by the large national retail chains which are nationally advertised and accepted brand labels.

We, as small, independent wholesale distributors cannot compete with the giant national organizations which have the benefit of mass purchasing, nationally advertised and accepted labels, and all of the re-

lated services which go with their marketing program.

We must be placed in a posture to band together and pool our resources if we are to survive. Our organization and our individual businesses will not survive without the protection that Senate bill 3587

Our member-distributors must have protection in their markets from having to compete against each other in order to be placed in a position from which they will be able to compete with the massive mar-

keting efforts and know-how of big business.

The large national organizations are able to easily control intraband competition to the extent, for all practical purposes that it doesn't even exist. They are then able to effectively compete against the brand merchandise of other big businesses while effectively eliminating the small independent businessman from being a competitive factor to them.

The passage of this bill would not only allow my small company and those of my associates to survive, but in doing so, will place another competitive factor in the market, and this, gentlemen, is what

the antitrust laws were designed to accomplish.

I can simply no longer afford to make an investment in my marketing area through my company's time, efforts, and money which can be rendered valueless by some other distributor or distributors selling the same label in my market which has gained consumer acceptance through my endeavors.

Without the protection that this bill offers, I will eventually have to let my company be absorbed by a big business interest as will Mr. Rainey and Mr. Koon, and many other members of our organization.

In the recent Supreme Court case decision, U.S. v. Topco Associates, the majority decision, which was based strictly on the present antitrust laws, held that associations like NIFDA could not enforce exclusive territorial rights for the marketing of their brand names.

The Court frankly admitted that the decision was not based on the equities of the situation but rather strictly on an interpretation of the antitrust laws as they now exist, and that the remedy for the present inequities would have to be sought through Congress, you gentlemen, and not the courts. This is why Senate bill 3587 has been introduced, and why we are here today.

Even in view of the present antitrust laws, the decision in the *Topco* case was not unanimous and Mr. Chief Justice Burger, in his dissenting opinion, pointed out a number of inequities which we feel existed

in the majority opinion.

I would like to quote certain points that Mr. Chief Justice Burger raised which I believe to be extremely relevant to your consideration of this bill.

He states and I quote:

This case does not involve restraints on interbrand competition or an allocation of markets by an association with monopoly or near-monopoly control of the sources of supply of one or more varieties of staple goods. Rather, we have an agreement among several small grocery chains to join in a cooperative endeavor which, in my view, has an unquestionably lawful principal purpose;

Indeed, the economic effect of the new rule laid down by the court today seems clear: unless Congress intervenes, grocery staples marketed under the private label brands with their lower consumer prices soon will be available only to

those who patronize the large national chains.

In conclusion, gentlemen, we have come before you today to point out to you the necessity of your favorable recommendation on this bill if our businesses are to survive. Such survival, we feel, is very closely related to the competitive free market in our economy as we know it today.

If the small, independent businessman can no longer survive, then the American principle of free enterprise cannot possibly survive.

This bill certainly contains adequate safeguards such as that our products must be in a free and open competition with the products of same general class and manufacture as distributed and sold by others.

The courts and antitrust enforcement agencies are not precluded by this bill from attacking exclusive territories granted to distributors of products which are so unique that for all practical purposes, they could not be said to be in free and open competition with other products.

We respectfully ask for your favorable recommendation of Senate bill 3587, and we are most grateful for this time you have afforded us in presenting to you what we believe to be a just and responsible reason for the necessity of this passage, a necessity not only to us but to the survival of this country's free enterprise system.

Thank you very much, Mr. Chairman, and gentlemen.

Senator Gurney. Thank you, Mr. Helms, and your associates.

Does the staff have questions? Mr. Bangert. Yes, Mr. Chairman.

As I understand from your statements, you decided to go to a XIFDA private label when you found out that you had what I guess would be a dual distribution problem with respect to the suppliers of national brands that you were dealing with, is that correct?

Mr. Helms. That is correct, sir. Before we organized the NIFDA organization and developed our own label and our own products, we were at the complete mercy of the big national manufacturers and

distributors.

Mr. Bangert. So I assume you could have broke up in territory through your efforts and then the national manufacturers could have come in and taken that away from you or given it to someone else?

Mr. Helms. Exactly so. They could have either done that or put in other distributors in the area and given them advantages over us

which was not uncommon, sir.

Mr. Bangert. I assume that the whole NIFDA organization apparently had similar problems, each of the members in the organization?

Mr. Helms. Exactly. That was the reason for banding together, why we came together. Most of the individuals had the same problem,

ves, sir.

Mr. Bangert. Now, do you still handle national brands as well as NIFDA?

Mr. Helms. Yes, we do; our own merchandise is probably less than

30 percent of our overall volume on a national scale, sir.

Mr. Bangert. I assume that you feel that the presence of the NIFDA label is a factor in at least keeping the prices of the national brands down, is that correct?

Mr. Helms. Very definitely so, sir.

Mr. Bangert. You feel you are offering competition in that area? Mr. Helms. Absolutely. We are not stymied. We are creating competition, we are adding to it.

Senator Gurney. How many NIFDA labels do you have? Mr. Helms. Sir, we have approximately 4,000 NIFDA labels.

Mr. RAINEY. You mean products, Senator? Senator Gurney. Yes, different products.

Mr. Helms. Yes, approximately 4,000, I would say.

Mr. BANGERT. And the importance of the NIFDA brand, as I understand it, you might find yourself in a situation where you would go and negotiate with Greyhound Host Houses or Howard Johnson's, and you would say, accept our products, and if you will put them on your list, why then, each of our members in that area will come and talk to you about price and that type of thing, is that right?

Mr. Helms. Absolutely. In contacting the national chains, gentlemen, we contact them and explain to them our unique situation. We are located in areas throughout the country and our businesses are

operated by locally individually-owned business.

We can contact them at their locations in that area and offer them merchandise that is competitive to what they are buying now and we can give them better service and give them as equal quality or better quality, and guarantee them to have equal prices or better.

Mr. Bangert. Now, you probably could not get a Jess Helms rating

in there?

Mr. Helms. It would not be possible. We would not have the money to do it on an individual basis.

Mr. Bangert. This really gives you the same advantages of national

advertising that the chains have.

Mr. Helms. Actually, so that we could assure the man in Los Angeles, Calif., that he will have the same quality product as the man in Washington, D.C., or New York City, or Greenville, S.C., yes, sir.

Mr. Bangerr. Then it is up to Jess Helms to go in there and see if he could offer a price that the local Howard Johnson's will accept.

Mr. Helms. Exactly, advantages over what he is presently getting. Senator Gurney. How much does your association spend on national advertising?

Mr. Helms. Harold, do you have the answer to that?

Mr. RAINEY. I would say, \$25,000 a year.

Mr. Koon. It is past that. I was president of the organization 3 years ago. I am out of the picture now as an officer, but at that point, it was approaching \$75,000 a year that we collectively spent on national

trade papers.

In addition to that, we are able to participate in all national trade shows whether it is the restaurant association or the like, school food service. That budget is also included in the advertising. That part is included in the advertising budget. It is over a hundred thousand a year.

Senator Gurney. That is a rather small amount. Your ability to

compete must be pricewise, is that right?

Mr. RAINEY. I would suggest, Senator, it is not as much pricewise as it is service and qualitywise.

Senator Gurney. I see.

Mr. Koon. The name of our game is service in the institutional business, primarily service and quality.

Mr. BANGERT. On the point of price, I assume you have to be competitive with the big organizations or you will not get the business.

Mr. Helms. That is true, and we could not be competitive if we were

not banded together and buving collectively.

Mr. Bangert. This gives you certain efficiencies you could realize through cooperative action that you could not realize by attempting to purchase on your own?

Mr. Helms. That is right, sir.

Mr. Bangert. I assume this means you can buy in carload lots and that type of thing, and recognize efficiency?

Mr. Helms. Exactly so, sir.

Senator Gurney. Do you have central canning plants or bottling

plants located——

Mr. Helms. No, we do not, sir. We contract with the canners and the suppliers, manufacturers. We do not manufacture—we have a small manufacturing plant in Atlanta, yes, we do, that manufactures

the little individual items such as sugar, salt and peppers you see on the table, individually packaged jellies, jams, preserves, those types of things.

That is a plant and it services part of our organization. It can-

not service all of it because of freight.

Senator Gurney. What about the bottling as opposed to making bottles and caps, is that centrally located?

Mr. Helms. I am sorry, I did not understand.

Senator Gurner. The bottling of your product, how is that done?

Mr. Helms. It is done right at the plant where we contract. We contract purchase quantities and they are shipped directly to our individual members.

Senator Gurney. These plants are centrally located in areas?

Mr. Helms. Yes.

Mr. Rainey. If I may add, Senator, also we have a central distribution warehouse setup where various packers who pack for us can ship

into the central warehouse in carload lots of a single item.

And then, out of that, we would get in-transit shipments to our warehouse from maybe a hundred different suppliers who had put products in this warehouse, so we have some substantial economies being ascertained by that sort of an operation, you see, where we could not do it as an individual.

Senator Gurney. Fine.

Mr. Helms. Mr. Chairman, I might add to that that in contacting these chain accounts, if we contact a chain account and he has a warehouse in any one individual member territory, and he elects to buy all of his products from this member and distribute them throughout the entire United States, we will say, for example, we have—that is perfectly all right with us.

We are not trying to say, well, you cannot do this because this is shipping it into a different member's territory. We are only asking that we be given the privilege and the right that a man cannot come into my territory and set up a warehouse and compete against me

with my own label, sir.

Mr. BANGERT. Were you present when the last witness testified?

Mr. Helms. Yes.

Mr. Bangert. His problem was that he attempted to sell to a ware-house within his territory and that warehouse in turn was shipping outside of the territory to their stores and he was told by his parent company, "You can't do that." I am wondering how you all handle that?

Mr. Helms. We do not care where they ship it to, sir, we are not

restricting reshipping it at all.

Mr. Bangert. So if by chance there was a large organization that had a warehouse in your territory that wanted to supply a whole surrounding region, you could sell it to him and he could ship it out into someone else's territory and you would not be penalized?

Mr. Helms. Absolutely, yes.

Mr. Chumbris. Will counsel yield?

I think the record ought to reflect there is a difference between your operation and the soft drink bottler. The soft drink bottler is a manufacturer of bottled goods, that he receives the syrup from his franchiser, whereas you people are in the business of power buying.

You have someone else who manufactures the products under your label.

Mr. Helms. That is right.

Mr. Chumbris. You may go to company x that has its own name brand and at the same time may be producing a product for you under your private label.

Mr. Helms. This is true, yes, sir.

Mr. Chumbris. The record should reflect there is a distinction between your business and the business of the witness prior to you.

Mr. Helms. There is, yes, sir.

Mr. Bangert. Yes, and perhaps this is one of the reasons why you feel so strongly that yours is a different case for the need of this legislation other than another person's, soft drink bottler?

Mr. Helms. Exactly, sir. Yes, sir, it is a unique situation. We recognize this. We would like for this to be included in the bill, sir, some-

thing that would cover this unique situation.

Mr. BANGERT. Can you give us a general idea of the sales volume of NIFDA products as it relates to percentage of your business or of sales in the industry?

Mr. Helms. I will let Mr. Koon answer that question.

Mr. Koon. Mr. Chairman, we studied this particular aspect of our program some couple of years ago in depth. We are talking about the food and drink industry, volume feeding of a \$30 billion industry. This industry is divided up in so many ways with different labels across the country. A big house in Denver has their own private label. They cover about six States. They have a part of the business. There are other national companies that have a part of the business.

I imagine it is divided up about 500 ways in the \$30 billion business. But to get a proper perspective of what percentage of business we do, in my case, NIFDA label accounts for about 60 percent of our business or about \$21/4 million worth of business. It varies throughout the country according to the market area and the amount of effort the distribu-

tors put in.

But reducing that \$30 billion back to the food costs, 40 percent of food costs is basically what an operator shoots for, food and drink. What portion of that \$30 billion is drink and what portion is food, I am not sure. No one has given a real breakdown on that.

Our NIFDA label, at purchase price by redistributors is in excess of \$70 million worth of business last year and multiplying a percentage operating margin on that would put it in the 85 million category.

Then, our 135 distributors represent about 270 million in total sales across the country. We are not unique in being the only organization of

this type. There are several others.

Though, in percentage, if you take the 30 million and break it down and, really, our part of the business that we sell, not selling the main entire items, which is the biggest cost in the restaurant—we are not in the fresh fish, fresh meat business—we are actually looking at a 15 percent of the total dollar volume on the industry. As to what we are looking for, it is 15 percent of 30 million, when we are talking about how much food products of our categories are sold throughout the institutions across country.

So our part is small, but of our type business on a national scale, we still rank among the top labels in acceptance in the industry be-

cause it is divided so many ways. Did I explain it?

Mr. Bangert, Yes, I think that does. Thank you very much. Presumably, you are 14 years old and apparently your label is not nationwide as yet, so I assume you are hoping that you occupy an even more important portion of that business.

Mr. Koox. We are in 42 States now.

Mr. Bangert. Normally, the antitrust lawyers tell us this type of an exemption we are talking about may be necessary for people just breaking into the business; but perhaps it should not be given to well-established business.

And I guess what you are really saying is that in your case, even though you have been in business for 14 years, under the NIFDA label, you are still getting established?

Mr. Helms. This is true, sir, we are seeking new distributors every

day.

Mr. Bangert. And those distributors do not want to become distributors unless—

Mr. Helms. Unless we can guarantee them the area that they want to build will be theirs in the days that lie ahead.

Mr. Bangerr. They can then be out competing with other people rather than with the NIFDA label.

Mr. Helms. Right.

Mr. RAINEY. Some of the major marketing centers of the country—we have not been able to get into them because we have not been able to give them an exclusive guarantee that no one is going to be able to come in there after they have worked to establish the label, and come into that territory and take the business that they worked for.

Mr. Bangert. I have just one last area. Perhaps this is a legal

question and if you do not want to get into it, we will not.

But there has been some question as to whether or not the bills that we are talking about are "rule of reason" bills or whether they

would make territorial allocations, per se, legal.

As I undertsand your position, the type of legislation you would be interested in is legislation that would say that the Department of Justice, the Federal Trade Commission, if they are going to attack an exclusive territorial allocation has to come up with economic facts to show that that territorial allocation really is, in type, competitive.

Mr. Helms. Yes.

Mr. Bangert. You are willing—if they can prove that—you are willing to get sued and lose?

Mr. Helms. Rule of reason, yes, we are willing to accept that,

sir.

Mr. Bangert. No further questions. Senator Gurney. Mr. Chumbris!

Mr. Chumbris. I have a point, Mr. Chairman. In your statement Mr. Helms you refer to the *United States* v. *Topco Associates*. In reading that decision, Justice Brennan put the issue in focus contrary to that of what some witnesses stated previously, and some will state for these hearings, that we should leave the matter to the law enforcement agencies of the Federal Government rather than Congress; Justice Brennan at 405, page 611, states:

There has been tremendous departures from the notion of a free enterprise system as it was originally conceived in this country. These departures have been the product of Congressional action and the will of the people. If a decision is made to sacrifice competition in one portion of the economy for greater competition than another portion, this, too, is a decision that must be made by

the Congress and not by private forces or by the courts.

Private forces are too keenly aware of their interests in making such decisions and the courts are ill-equipped and ill-suited for such decisionmaking to analyze, interpret, evaluate the myriad of competing interests and the endless data that surely would be brought to bear on such decisions and to make the delicate judgment on the relative values of society to competitive areas of the economy, the judgment of the elected representatives of the people is required.

And Justice Brennan was one of the Justices who concurred in the majority opinion. That was the reason why you people ask that your bill be introduced in the Congress to take care of your particular problem.

Mr. Helms. That is right, sir.

Mr. Chumbris. Your bill varies from some of the other bills that were introduced that had a problem different from yours.

Mr. Helms. That is right, sir.

Mr. Chumbris. This is not anything new because when problems were created, laws such as the Sherman Act were passed to take care of the problems. In the Sherman Act, Congress curbed some business practices.

In 1914, we had the Clayton Act and the Federal Trade Commission Act. And in 1936, when the Clayton Act was not sufficient to cover some of the problems affecting small business, we had the Robinson-Patman

Act.

In 1950, we had an amendment to the Clayton Act, section 7, dealing with mergers, because the original merger laws did not take care of all of the problems that Congress thought should be taken care of.

The same thing happened more recently with the Newspaper Preservation Act after the Supreme Court came down with a decision. In professional sports, the Supreme Court came down with a decision. So professional sports went to Congress and asked Congress for its aid and it did give certain aid on television contracts.

The football merger bill was handled the same way. Congress responded. We also have the basketball merger bill. Now we have this

bill.

Mr. Chairman, I ask unanimous consent that a list of bills that are exemptions from the antitrust laws that Congress has passed in the years past—there are about 12 in number—be made a part of the record.

Senator Gurney. They will be made a part of the record.

Mr. Chumbris. I have no further questions.

Senator Gurney. Thank you, gentlemen, very much. You certainly shed further light.

Mr. Helms. Thank you very much for the privilege of hearing our

case and presenting it.

Senator Gurney. Our next witness is Mr. W. W. Clements, president of Dr Pepper Co. Is he here?

### STATEMENT OF W. W. CLEMENTS, PRESIDENT OF DR PEPPER CO.

Mr. CLEMENTS. Yes, sir.

Senator Gurney. Do you have a statement to offer?

Mr. CLEMENTS. Yes, sir. Mr. Chairman; I submitted a statement previously which I would like to request, with your permission, that

the full statement be printed in the record. And with that understanding, then I would like to, in the interest of time, just summarize, please.

Senator Gurney. It will be printed in the record.

(The document follows, Testimony resumes on p. 529.)

PRESENTATION BY W. W. CLEMENTS, PRESIDENT-CHIEF EXECUTIVE OFFICER, DR PEPPER COMPANY, DALLAS, TEXAS, TO UNITED STATES SENATE, COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, SEPTEMBER 14, 1972

Mr. Chairman, members of the committee, my name is W. W. Clements, president of the Dr Pepper Company, Dallas, Texas, I am grateful for this opportunity to speak on behalf of the franchise system in the soft drink industry.

First, I would like to review with you my experience in the soft drink industry and give you an outline of the Dr Pepper Company's history. Hopefully by having this, it will give you a better understanding as to why I believe so strongly in the franchise system of distribution for soft drinks, a system which is as old as the Federal antitrust laws themselves and has always meant and still means that a bottler has an exclusive and protected territory in which he alone can sell the brand of soft drinks for which he holds a trademark license and a franchise agreement.

### PERSONAL BACKGROUND

On July 28, 1935, after attending college for two years, I secured a job as a route salesman with the Dr Pepper Bottling Company of Tuscaloosa, Alabama.

When I started, we had two routes and finally built the business until we were operating four routes at the time I left to join the Dr Pepper Company in 1942.

From January 1942 until April 1944, I was a zone manager for the Dr Pepper Company, working with the franchise bottlers and their organizations in all marketing activities, which included riding with the route salesmen, making surveys, placing advertising, and opening new accounts. I also held sales training meetings as well as counseled with the bottlers regarding their overall plans, including production and finance, and interpreting company policies to make sure of product control and proper use of the trademark.

In 1944 I became sales promotion manager and was responsible for development of sales promotion and training programs for bottlers and their employees. Most of this time was spent working with the bottlers in their plants and in

the retail trade.

In 1949 I left the company briefly to become a 50% owner of the Dr Pepper Bottling Companies of Roanoke and Staunton, Virginia, where I had an oppor-

tunity to participate in the day-to-day management of bottling plants.

In September of 1949, I returned to the Dr Pepper Company as general sales manager. In 1967 I was elected executive vice president and a member of the board of directors. In 1969, president, and in 1970, president and chief executive

Even though my overall responsibilities have increased, my primary responsibility is still working with the franchise bottler to help develop greater consumer acceptance for Dr Pepper in his territory.

Now, so that you may better understand the Dr Pepper Company and its posi-

tion in the soft drink industry. I would like to review briefly the events that have helped bring it from a small local company to a small but fast-growing national company.

### DR PEPPER HISTORY

Dr Pepper was originated and first sold in a corner drugstore in Waco, Texas in 1885. It was bottled for the first time in 1890 by the Artesian Manufacturing and Bottling Company of Waco. The present company was organized in 1923 in Dallas, Texas.

Granting of franchises to local independent businessmen was started shortly

thereafter.

From the period 1925 through 1941, Dr Pepper franchising progressed satisfactorily. Sales of the product grew in the original markets, and a number of new markets were opened through the franchise method in the southwest, the south,

mid-west, and to California and Pennsylvania.

During World War II years, because of the restriction of supplies, the expansion effort was abandoned. Immediately after the war, some new territories were franchised to returning servicemen, but this was not successful as many of them failed shortly thereafter because of shortage of capital and lack of business experience.

Until 1963, the sales development was largely concentrated in the southern part of the country. It was necessary for Dr Pepper to franchise established bottlers of other brands in order to get national coverage and offer national competition to the leading brands. This could not have been done without giving exclusive and protective territorial provisions.

These bottlers were not acquiring the Dr Pepper franchise because they wanted to help us, but because it provided increased sales volume within the bottlers'

existing territories.

Today Dr Pepper is being produced and distributed in all but a few areas of

the country.

While the total number of bottlers in the U.S. has been decreasing, the number of Dr Pepper bottlers has increased from 395 at the end of 1961, to 512 at the end of 1971. This has come about even though there have been some mergers and consolidations of Dr Pepper plants.

We are still a small company in the soft drink industry with about a 4% share of the market, but we are growing rapidly and becoming an ever-greater factor

of competition within the industry.

Dr Pepper is an example of how a product can succeed in entering the highly competitive soft drink market only with the help of the franchise system which provides protected territories to the bottlers.

With that background, I will give you my reasons why legislation as rep-

resented by S. 3133 should be enacted.

### DOUBT AND UNCERTAINTY CREATED BY THE FTC CASES AGAINST SOFT DRINK FRANCHISE COMPANIES

The soft drink bottlers of America have been instrumental in having this legislation introduced to prevent drastic changes adversely affecting the industry and the consumer which would result if the Federal Trade Commission strikes and the protective territory clauses in bottlers' franchise agreements.

The Federal Trade Commission instituted eight separate cases involving national brands of soft drinks in which it is sought to have the protective territory provisions in all of the franchise agreements with the bottlers declared invalid as violating the Federal antitrust laws. This in spite of the fact that these provisions have been in effect in the industry unchallenged under the antitrust laws for about the full length of time that the antitrust laws have been in existence.

While our lawyers are strongly of the opinion that the FTC staff is wrong on the law and that the United States Supreme Court decisions do not invalidate the protective territorial provisions in effect in the soft drink industry for many reasons, it is nevertheless, a matter which can only be determined first by the Federal Trade Commission and then by the courts. This may require several

vears.

In the meantime, the franchise system in the soft drink industry will be under a shadow and in a state of doubt and uncertainty. The value of every bottler's business has been affected by it. It is for this reason that it is imperative that this doubt be removed speedily by establishing the legality of these territorial protective provisions beyond any doubt by the passage of the proposed law.

Regardless of what side may be correct on the law questions raised in the FTC cases, there is no doubt in my mind that the FTC staff is clearly wrong on

the economic issues raised in these cases.

I may not know the fine points of the law involved in this, but I do know the industry facts and the business common sense involved; and I do know that invalidating these territorial provisions would injure not only the industry and the bottlers and the economy of the communities in which the bottlers are located, but that it would injure the consumers as well.

I would like to tell the committee about the business issues involved here from

my knowledge of the facts of this industry.

### THE SOFT DRINK INDUSTRY IS TRULY UNIQUE

Uniqueness, by itself, is not too important, but when it becomes the basis for seeking legislation, it is very important that it be recognized and understood. Most industries can find something about themselves that is unique, but the magnitude of the uniqueness of the soft drink industry makes it stand out from the others.

In much of the testimony presented to you in this hearing, the elements of this uniqueness have been emphasized. My point in mentioning it again is to try to

make it clear that opponents of this legislation are seeking to strike down territorial protective provisions in the soft drink industry, and in so doing, are not recognizing the uniqueness which provides communities with local industries and consumers with desired services that cannot be provided by more conventional systems.

The bottling business is so different from any other industry that the

dis-similarities far outweigh the similarities.

I was not totally aware of this until I became active in the Sales and Marketing Executives Association in 1949. I knew very little about other distribution methods and their problems. In the past 23 years, I have been extremely active, serving as President of the Dallas Association, the Southwest Council, and President and Chairman of the Board for Sales and Marketing Executives International, and on its board for about twenty years.

I have attended, participated and conducted marketing conferences hundreds of times in this country and abroad, but in none of these could we ever use the soft drink industry as a case study problem because it was so different. Not only because of the distribution method used in this industry, but also because in

the soft drink industry, the franchisee is also a manufacturer.

Also, the marketing strategy is vastly different as no other product depends upon so complete and total availability which requires constant, continuous and effective service. Neither do other mass-consumer industries use a returnable

package.

In 1956, the Dr Pepper Company brought in a man as president who had been outstandingly successful in marketing in the food industry. His experience included flour products, cereal, coffee, and the complete line of General Foods Products. He served as vice president and general sales manager for that fine company.

He was completely amazed over the dis-similarities because in his previous experience, he had been able to make comparisons—comparing previous product experience, comparing one market growth to another, and he soon found out that there were no "black and white" situations even within the soft drink in-

dustry, much less when compared to other industries.

This uniqueness is based not only on the nature of the products, but the habits of the consumers and the type of containers necessary to insure product quality

and convenience to the consumer.

It provides a wholesome product to all retail accounts and supplies the service to these accounts necessary to get the product on display or in coolers and vendors, keep them stocked regularly, and merchandises and places point of sale to create movement of the product.

Service to the retailer is one of the strong points of this system of distribution. It also provides the retailer with a product that turns over many, many times a year and with one of the highest profit margins of any product he

sells.

Even with all of this, the consumer is able to buy the soft drink of his choice

at any time and any place he desires, at a very low price.

The consumer can buy Dr Pepper today in Dallas. Texas, cheaper than he could when I started selling Dr Pepper 37 years ago. This is on a regular price basis, and when specials are run, the price is much lower. This is also true in almost, if not all, markets where Dr Pepper was sold 37 years ago.

No other system can do this—no other system has ever done it—and in my judgment based on 37 years of experience in this industry, and after constantly

searching for a better way, I am convinced no other system ever will.

THE PRESENT FRANCHISE SYSTEM IS VITALLY NEEDED BY THE DR PEPPER COMPANY AND ANY OTHER SOFT DRINK COMPANY SEEKING TO ENTER THE NATIONAL MARKET OR IMPROVE ITS SHARE OF THE MARKET

Now, Mr. Chairman, let me hasten to put the record straight and assure you that I am not appearing purely on a charitable basis on behalf of the franchise bottlers and the smaller retail dealers and consumers.

I am here also representing my company, its stockholders, and our employees because if this legislation is not passed and the territorial protective provisions are invalidated, our company will be seriously handicapped in its efforts to increase our present 4% of the national sales volume of soft drinks.

The FTC case seeks to promote competition of Dr Pepper with Dr Pepper at the manufacturing level. This is a business absurdity and contrary to the interest of the consumer. The only thing that makes sense is competition by

Dr Pepper with Coca-Cola, Pepsi-Cola, Seven-Up, and the other soft drink products at all levels.

If this legislation is not passed and the territorial protective provisions are invalidated, it will greatly weaken the ability of Dr Pepper to compete with the larger companies with their greater market share. Yet this in economic reality

is the only meaningful competition.

Dr Pepper has been able to work its way into new territories to compete with these major brands only by giving territorial protection. Many times it has been able to compete for a market share in these territories only by giving a frunchise with protected territory to a bottler of one of the major brands. Should the territorial protective provisions become invalid and this legislation not be passed, this will be made impossible.

The FTC staff's restructuring of the distribution system in our industry would give the larger franchise companies, such as Coke and Pepsi, a tremendous and unfair advantage. They have a great advantage today because of their volume and resources, but this is an advantage they created themselves through their own initiative, innovation, aggressiveness, and re-investment of profits into their business, and could not be considered unfair because they have earned

their present position.

This we understand and respect, and it only serves as an inspiration and chal-

lenge to us because we know if they did it, we can too—only better.

After all of the years of hard work, experimenting, planning and aggressive effort and by re-investing for the future, the Dr Pepper Company is making excellent growth today. We have come from nowhere in 1926 when our sales were only \$48,356 to \$63,600,000 in 1971.

We have become a substantial company, but when you compare our sales to the Coca-Cola Company and Pepsico's sales of over a billion dollars annually, it is very apparent that we are still very small compared to our major competition.

It would have been impossible for the Dr Pepper Company or any other company to have accomplished what we have without the protected territory clause in franchise agreements. No bottler or any businessman would agree to make this investment in money and time necessary to build a successful and profitable business unless he was given assurance that the territory would belong to him once he had developed it.

Now, I want to tell you why Dr Pepper Company needs a network of franchised bottlers with protected territories rather than marketing its products through the channels used by most other food products or through bottlers with

unprotected territories.

A new soft drink can obtain shelf space in supermarkets and some consumer movement by enormous, unaffordable advertising and promotion programs, but it cannot achieve sales development by this means alone. The product must be sampled constantly and made available in so-called "cold bottle" outlets so people can try it whenever they need refreshment.

If the product is good, a consumer acceptance for it eventually develops and sales volume becomes adequate to generate a profit for the bottler. But once established in a market, the product must continue to be readily available in both the "cold bottle" and "take home" outlets or it will lose consumer attention.

This is the way it is for franchised soft drinks, and it is one of the reasons why

we say the industry is unique.

The long established route truck method of distribution which is standard in the industry is by far the most efficient method to serve the "cold bottle" and "take home" outlets, and it is the only conceivable method of distributing and reclaiming the returnable bottle.

It is such an important part of the industry that I think it would be worth a few minutes of your time to take you on a typical route with the help of a

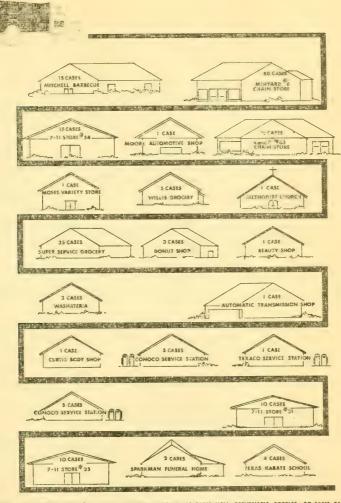
schematic drawing which you will find on the next page.

This is an actual Dr Pepper route in Dallas, Texas. It represents the variety of outlets serviced by a route truck driver on a single day. Essentially the same route would be serviced twice a week. Service is the life-blood of this industry.

On these routes, the driver not only delivers the products and picks up the empty returnable bottles, but he frequently fills coolers and vending machines, adjusts cooling mechanisms, and arranges for the bottling plant to furnish such equipment to the outlets so that the customers are adequately served.

Of the 21 stops shown in the drawing, two are chain stores which, under the action desired by the FTC staff, would receive their Dr Pepper via chain warehouse and chain delivery trucks. Together the two chain stores account for 95 cases. The other 19 outlets account for 104 cases. In other words, 90% of the stops bring in only 52% of the sales.

## Typical one day route truck delivery and sales Dr Pepper Bottling Company, Dallas, Texas 1972



TOTAL: 100 CASES DELIVERED (167 CASES RETURNABLE BOTTLES, 12 CASES NON-RETURNABLE BOTTLES, 20 CASES CANS); 188 CASES EMPTY RETURNABLE BOTTLES PICKED UP.

You can see that the cost of operating the route for 104 case sales would be almost as high as for the present route with 199 case sales. Loss of the chain stores, thereby greatly increases the cost of distribution to the remaining outlets.

These are predominantly the "cold bottle" outlets which are vitally important to a bottler in maintaining total awareness and availability of his products.

The bottler would have no choice but to raise his prices to these outlets and hope that he could hang on to the sales. This might work out all right for the bottlers in the metropolitan markets who would capture all of the chain warehouse business, but it would eventually be disastrous to the Dr Pepper product. The small town bottler would lose all of the chain store business and have only these more costly outlets to serve, and Dr Pepper would be out of that market as the bottler could not survive.

If a bottler were unable to continue in business, it would be necessary for Dr Pepper Company to work out some other method of servicing the "cold bottle" outlets because they are too important a part of our total product distribution.

Whatever method we were to work out would be more costly than the present route truck system and would greatly hinder our continued development of competition to the major soft drink products.

### OTHER DISTRIBUTION METHODS TESTED

As a part of our efforts to test other methods of distribution besides route sales delivery, we tested a one-way family size bottle in Indianapolis where we did not have a bottler. This test also included the use of brokers and warehouses of chains for re-distribution to their stores.

We learned many things from this test. One, that it was more expensive, not less. It took a tremendous amount of advertising to get the chains to stock it. They would forget to re-order; and when they did, they would not order sufficient quantities to keep the shelves stocked. Most of all, we had no way to reach the largest segment of the market, the cold bottle consumption locations.

We later selected Los Angeles for another test since Dr Pepper did not have a franchise bottler in that market. In this test we added some elements, We distributed cans in two sizes—6 ounce and 10 ounce—and a family size bottle.

We also trained and developed a merchandising organization of our own. These men called on the headquarters of the chains to present our program and packages, and secure orders which were delivered to the warehouses for re-distribution to their own stores. They also performed merchandising activities in the retail stores of the chains.

At the time of their call to the headquarters, they presented our advertising and promotion program to the buyers. The chains will not stock any product unless they are convinced that you are going to move it and at a good profit to them.

With the additional packages, the manpower and strong advertising support, we did better than in Indianapolis; but we were still only able to reach a small segment of the market at a very high cost. And we were not able to get availability throughout the market, and especially in the all-important "cold bottle" outlets.

As a result of these tests, we concluded that the only practical and effective method of distribution for Dr Pepper was through the franchise bottler system.

I cannot see how any new soft drink product could even get started in the market without the present route truck system of distribution operating within protected territories.

### DR PEPPER COMPANY WOULD BE FORCED INTO FORWARD INTEGRATION

The Dr Pepper Company would be forced into owning and operating a great number of bottling plants throughout the United States if this legislation is not passed and the territorial protective provisions are invalidated.

Our present structure (we presently own three bottling plants), and our past history proves that we do not desire to do this. We would be left with no other alternative, however, as many bottlers would be unable or unwilling to service their markets in the depth required.

This would also happen in varying degrees to other brands. However, the larger companies with greater resources would have a tremendous advantage. The industry would end up with a very few large bottling companies, and they would all be owned by large companies, such as franchise companies, publicowned corporations and food chains.

The small independent bottler businessman would be a thing of the past.

Mr. Chairman, those are my particular reasons why this legislation should be enacted. I would like now to comment on some claims made by the FTC staff on industry matters with which I have had a great deal of experience.

## THE FTC STAFF SAYS THAT REMOVAL OF TERRITORIAL RESTRICTIONS WILL RESULT IN LOWER PRICES TO THE CONSUMERS

If territorial protection is destroyed, the chain store organizations will immediately push either to buy up the small bottlers at distress prices or, in most instances, to advertise for large quantity shipments which can be made only by

the big city bottlers to the chains' warehouses at central distribution points for

trucking from there over wide territories.

It has been conclusively brought out by other witnesses that distribution through chain warehouses would quickly result in conversion of the industry to non-returnable containers. It is entirely impractical to handle returned bottles through the warehouse distribution system, whereas it is quite practical under the present system in which the route salesman picks up cases of empty bottles and puts them back on his truck as he delivers full bottles to the individual retail outlets.

If the FTC staff wants what it claims—lower prices to the consumers, and that is certainly what the industry wants—it cannot be done with non-returnable packages as this can only result in higher prices because someone must pay for

the package that is used only one time and then thrown away.

Returnable bottles in 1971 accounted for about 60% of soft drink package sales. If these sales were to be converted to non-returnable packages, the increased cost to the consumer would be well over one billion dollars annually.

THE FTC TAFF SAYS THAT REMOVAL OF TERRITORIAL RESTRICTIONS WILL NOT AFFECT ECOLOGY

The soft drink industry is today spending a great deal of money and time in recovery and recycling programs and is cooperating with the U.S. Government and other industries in the recovery and recycling center for resources in Washington.

The soft drink industry accounts for less than 5% of the solid waste. If this legislation is not passed and returnable bottles are replaced with non-returnable containers, our contribution to the problem will be multiplied and our ability to

help find and execute the solutions will be drastically reduced.

At the present time, most soft drink retail outlets can be thought of as collection centers for returnable bottles. Over 50,000 route salesmen are collectors of the bottles, which, if they were not returnable, would become part of the problem of solid waste.

This is presently being done at no cost to local, State, or Federal governments; and, at the same time, franchise bottlers are providing wholesome refreshments

to all American consumers at the lowest possible prices.

## THE FTC STAFF SAYS REMOVAL OF TERRITORIAL RESTRICTONS WILL HELP KEEP SMALL BOTTLERS IN BUSINESS

Much has already been stated by others about the FTC staff's proposed action and the serious impact it will have on the small bottler, and I must re-emphasize the seriousness of this fact because, if the industry is restructured for the benefit of the chains and to the detriment of the consumer, it will be the end of the small bottler.

This industry was built by the small independent businessman. Most were, and the majority still are, family-owned and operated businesses. Even many of the larger plants came from a small beginning, and they built their business to where it is today on faith, hard work, determination, and their own ingenuity and innovation, and by re-investing their profits into the building of their business.

The FTC staff claims, however, that the trend toward the acquisition of small bottling plants by larger bottling plants has already been established. To the extent that this is true, such acquisitions have been the result of an orderly evolution brought about by economic considerations and considerations of good business practices.

This evolution will continue to some degree. Plants will be larger and fewer, but most will still be in small or medium size towns because of territory protection, whereas the FTC action would result in almost all of the operations being

in the large metropolitan areas.

When economics and changing market conditions indicate in a particular situation that sale of one bottling operation to another bottling operation is indicated, the selling bottler is able to obtain a reasonable price for his business. Under this system, the selling bottler is compensated for the value of his most valuable asset, which is his local franchise.

If the small bottler's territory is not protected and the big city bottler can invade it at will, the incentive of the big city bottler to buy the smaller plant at a fair price will be removed, and the value of the small bottler's franchise will be destroyed. His business will become almost zero in worth. It will be nothing

short of a calamity to hundreds of the small town bottlers in easy range of big

city bottlers.

This is a capital intensive business today. In the early days of the soft drink industry, the money required to start a bottling plant and develop a consumer franchise was much less than it is today. The need has always been there. The amount required is in almost direct ratio to the population of the franchised territory.

An old "rule of thumb" of determining capital required was \$1.00 per person in the territory. Today it is probably closer to \$3.00. The money can come from equity investment at the outset, additional capital investment as the business

grows, and as a re-investment of profits.

Re-investment of profits into the business has enabled the majority of plants still in business to exist and grow. The soft drink bottling business has become what it is today because these people worked and managed their businesses well, and in most cases, deprived themselves of many things in order to re-invest the book profits into growth, hoping someday to have a more profitable business, and to have a business with real value.

Should the territorial protective provisions become invalid and this legislation not be passed, the bottlers will be robbed of a lifetime of investment and hard

work without any chance of being compensated for it.

Not only would they not be able to sell their businesses, but they would have to sell their machinery and trucks as used equipment, and there is not much of a

market for these items.

The building would have to be leased or sold, and since it was built for a bottling plant, it would cost a great deal to convert it to a multi-purpose building. Most of his original investment would be lost and his profit which had been plowed back into his business would also be lost.

### THE REMEDY OFFERED BY THE FTC STAFF

As I see it, the FTC staff plans to ask for a decree restricting certain large bottlers from selling outside of their present territories for ten years but permitting other bottlers to sell wherever they wish. At the same time, they say that such restriction is illegal when it is a part of a franchise agreement. I cannot understand this, and our lawyers cannot understand it.

Also, as I see it, the decree sought by the FTC staff would prohibit soft drink manufacturers and certain large bottlers from expanding their territories during the ten-year period. This would take away the most likely purchasers for a small bottler's business. I cannot understand how this is supposed to be in the interest

of the small bottler.

The effect of this most recent action by the FTC staff is to add still more uncertainty to the soft drink industry on top of that already existing as a result of the FTC's original complaints seeking to end territorial protection for bottlers.

As long as the FTC litigation continues—and this will probably be for several more years—no franchised bottler, large or small, will know what he will eventually be permitted to do, or what his immediate competitors will be permitted to do, or what his potential competitors in other territories will be permitted to do. With such uncertainty, he can only guess what to do on many important business decisions which would normally be based in intelligent short-range and long-range planning—and guessing too often leads to disaster.

The prompt passage of this legislation sought by the bottlers is extremely

important to the continued viability of their businesses.

## THE FTC STAFF SAYS THAT HIGH CONCENTRATION LEVELS EXIST IN THE SOFT DRINK INDUSTRY

At no time has the FTC staff said how many soft drink firms should be in business in either a local market or the national market. They just say that there are too few and that one reason for it is the extent to which bottlers produce products of several syrup manufacturers.

They cite, for example, that in New York City, both Coca-Cola and Dr Pepper products are marketed by the Coca-Cola Bottling Company of New York. Since I am quite familiar with that situation. I would like to tell you about our

experience in trying to enter the New York market.

In 1957, the management of the Dr Pepper Company was determined that we should enter the New York market. This one, like most of our other franchising

efforts at that time, was destined for failure as we were not able to acquire any

of the strong bottlers who serviced the entire market.

We put together a group of small bottlers who only served small sections of the market, and not all outlets in their area, and attempted to break into the world's largest and most prestigious market—and needless to say, without any success.

The only month we even came close to our sales projection was when we had a "one-free-with-one" promotion, and the plants could not produce or deliver all

the orders that were received.

We eventually worked out an agreement with each bottler for the release of his franchise, and either bought or helped him sell his Dr Pepper identified supplies.

As a result of this and other similar experiences, we re-evaluated our programs and developed criteria that prospective bottlers should meet. In general they are:

1. Adequate distribution system for coverage of all territory.

2. Knowledgeable and experienced in the marketing of soft drinks.

3. Finances must be adequate to introduce a new product throughout the territory and maintain its sales through the early years of market development.

4. Production facilities must meet our requirements to produce a quality product, and must have sufficient capacity to produce required volume in all packages necessary for the market.

5. Integrity of the bottler as we rely on him to represent Dr Pepper in his

market and use our trademark.

6. Desire to have Dr Pepper and determination to make it successful in his market.

It is obvious that to meet these criteria today, a bottler would almost have to

be in active business with one or more franchise products.

By employing these criteria in 1970, we were able to secure the Coca-Cola Bottling Company of New York as the Dr Pepper bottler. Even with all the economic and competitive reasons, he would not have been interested in Dr Pepper without the exclusive territory agreement. Neither would have the Tucumcari, New Mexico Coca-Cola bottler been interested—the first Coca-Cola bottler to acquire Dr Pepper, and perhaps the smallest.

As you already know, New York was not the first, nor was it the last, but it is the biggest. So, whether it is a big, small or medium size market, they need us—we need them—and the consumer benefits by having more products competing for

her purchases.

Dr Pepper today has 184 Coca-Cola combination plants, and 65 of them have

one or two more national brands.

We have 161 Pepsi-Cola combination plants, and 78 have one or two other national brands.

We also have combination Dr Pepper and 7-Up plants, Dr Pepper and Royal Crown Cola, and Dr Pepper and Canada Dry, as well as many Dr Pepper bottlers

who do not have another national brand.

It is remarkably strange to me that it would be contended that it is bad for competition for Dr Pepper to be bottled by the same bottler who bottles some other brand because, as I understand it, the antitrust laws would prohibit an agreement between Dr Pepper Company and one of its bottlers that prohibited

its bottler from bottling or selling Pepsi-Cola, Coca-Cola or 7-Up.

The FTC staff and the Department of Justice would say that this was a viola-

tion of the antitrust laws and against competition.

But now it is argued the other way around by the FTC lawyers and others that it is against competition because the bottlers in many instances do bottle Dr

Pepper and some other brand or brands as well.

There wouldn't be any Dr Pepper competition with the major brands in many areas of the country, and Dr Pepper wouldn't have been able to get national coverage, penetrate new markets and increase its market share through fierce competition except for following in many instances the multi-brand bottling concept.

It is a sound concept because it enables the bottler to keep his business profitable, makes him more competitive in the marketplace than he would be with only one brand. Plus it provides an opportunity for emerging national brands to enter these markets and compete. It also provides a wider choice for the consumer and enables him to buy the soft drink of his choice at any location throughout the territory, and at a low price.

THE FTC STAFF SAYS THAT INTERBRAND COMPETITION IN THE SOFT DRINK INDUSTRY IS INADEQUATE AND INTRABRAND COMPETITION SHOULD BE ADDED

They fail to show where interbrand competition is inadequate, and they fail to describe what they consider to be adequate competition. Surely, if they looked around even a little bit, they would have seen the intense interbrand competition which exists.

Instead, they prescribe intrabrand competition, citing the automobile industry as an example of intrabrand competition. They say that a person can shop for a Chevrolet among several dealers to obtain the best price. They somehow fail to see that the same person can shop for Dr Pepper among several stores to obtain the best price.

Intrabrand competition for soft drink sales exists at the present time at the retail level, just as it does for automobiles and most other consumer products.

What the FTC staff is really trying to do is create intrabrand competition at the manufacturer's level by having one bottler of Dr Pepper products compete with another bottler or Dr Pepper products for sales to large grocery chains. If they succeed, soft drinks will be the only products in intrabrand competition for sales to the chains. None of the other 8,000 or so items purchased by them are in intrabrand competition at the manufacturer's level.

Intrabrand competition is the important thing, and the franchise system has developed that to a high degree on sales offerings of many brands by the bottlers

and the offering of many competing brands by the retail outlets.

#### SUPREME COURT JUSTICES RECOGNIZE NEED FOR CONGRESSIONAL ACTION

The FTC lawyers argue that the recent Supreme Court decision in the Topco case invalidates the protective territory provisions in our contracts with our bottlers, and our lawyers do not believe that it does. Regardless of that, I do know from reading it that the Topco decision shows that all of the justices recognize that the matter should really be settled by the Congress and not by the courts.

This is shown by the following language from the court's majority opinion written by Mr. Justice Marshall in the Topco case, as well as the language of Chief Justice Burger and Mr. Justice Blackmun. The majority opinion says, and Language.

"There have been tremendous departures from the notion of a free enterprise system as it was originally conceived in this country. These departures have been

the product of congressional action and the will of the people.

"If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision which must be made by Congress and not by private forces or by the courts.

"Private sources are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision-making.

"To analyze, interpret, and evaluate the myriad of competing interests and the endless data which would surely be brought to bear on such decisions and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required."

Mr. Justice Blackmun, in his concurring opinion in the Topco case says:

"The bigs, therefore, should find it easier to get bigger and as a consequence, reality seems at odds with the public interest . . . relief, if any is to be forthcoming, apparently must be by way of legislation."

Mr. Chief Justice Burger, in his dissenting opinion in the Topco case, uses

the following language:

"Indeed, the economic effect of the new rule laid down by the court today seems clear: unless Congress intervenes, grocery staples marketed under private label brands with their lower consumer prices will soon be available only to those who patronize the large national chains."

#### S. 3133 IS A GOOD BILL

It is my hope that Congress will listen to the Supreme Court justices and the large majority of soft drink bottlers in the country to understand the basic need for 8, 3133.

The bill does nothing more than remove a serious threat to the well being of the soft drink industry and the consumers served by the industry. Without it, the industry stands to be adversely restructured, not for the good of competition or the consumer, but to satisfy FTC lawyers' interpretation of the present law that a restricted territorial arrangement in the soft drink industry is illegal. Any doubt about its legality should be removed by the passage of this bill.

The bill will preserve these features of American life:

(1) A wide choice of soft drink products in package sizes and types desired by the consumer.

(2) The returnable bottle which provides the lowest priced product to the consumer and reduces the litter and solid waste problem.

(3) Locally operated bottling plants in small as well as large cities, each contributing employment, taxes and services to their community.

(4) Convenient availability of soft drinks—in small groceries as well as large chain stores—in filling stations, beauty shops, bowling alleys and offices.

(5) A way for new soft drink products to become established in the market

and compete with existing products.

(6) A way for small companies in the industry to grow.

Thank you, Mr. Chairman, for your courtesy and again for this opportunity to contribute to your committee's knowledge of the soft drink industry.

Mr. Clements. Thank you, sir.

My name is W. W. Clements, president of Dr Pepper Co., Dallas,

I am grateful for this opportunity to speak on behalf of the fran-

chise system in the soft drink industry.

It is my hope that by reading the testimony which I have submitted, my background and my company's background, that it will enable you and the entire committee to have a better understanding as to why I believe so strongly in the franchise system for distribution for soft drinks—a system, Mr. Chairman, which is as old as the Federal antitrust laws themselves, and has always meant, and still means, that a bottler has an exclusive and protected territory in which he, alone, can sell the brand of soft drinks for which he holds a trademark license and a franchise agreement.

With that, I am going to skip my company's background and start on page 5: Today, Dr Pepper is being produced and distributed in all

but a few areas of the country.

While the total number of bottlers in the United States has been decreasing, the number of Dr Pepper bottlers has increased from 395 at the end of 1961, to 512 at the end of 1971. This has come about even though we have had a great number of mergers and consolidations of Dr Pepper plants.

Even with our growth, we are still a small company in the soft drink industry, with only about a 4-percent share of the national market. But we are growing rapidly and becoming an even greater

factor of competition within the industry.

Dr Pepper is an example of how a product can succeed in entering the highly competitive soft drink market only with the help of the franchise system which provides protected territories to the bottlers.

With that brief background, plus what is in this complete report, I would now like to give you my reasons as to why I feel that legislation as represented by S. 3133 should be enacted.

Today in the industry there is a great deal of doubt and uncertainty

created by the FTC cases against soft drink franchise companies.

The soft drink bottlers of  $\Lambda$  merica have been instrumental in having this legislation introduced to prevent drastic changes that would adversely affect the industry and the consumer, which would result if the Federal Trade Commission strikes out the protective territory

clauses in bottlers' franchise agreements.

Now, while our lawyers are strongly of the opinion that the FTC staff is wrong on the law, and that the U.S. Supreme Court decisions do not invalidate the protective territorial provisions in effect in the soft drink industry for many reasons, it is, nevertheless, a matter which can only be determined first by the Federal Trade Commission and then by the courts, and this certainly will require many years.

Now, regardless of which side may be correct on the law questions raised in the FTC cases, there is no doubt in my mind that the FTC staff is clearly wrong on the economic issues raised in these cases.

I may not know the fine points of the law involved, but I do know the industry facts and the business commonsense involved, and I do know that invalidating these territorial provisions would injure not only the industry and the bottlers and the economy of the communities in which these plants are located, but that it would injure the consumer as well.

I would like to tell the committee now about the business issues

involved, from my knowledge of the facts of this industry.

The soft drink industry is clearly unique. Uniqueness in itself is not too important, but when it becomes the basis for seeking legislation, it is very important that it be recognized and understood.

Most industries can find something about themselves that is unique, but the magnitude of uniqueness of the soft drink industry makes it

stand out from the others.

The bottling business is so different from any other industry that

the dissimilarity far outweighs the similarities.

I was not totally aware of this until I became active in the sales and marketing executives international association in 1949. I knew very little about other distribution methods and their problems.

But in the past 23 years, I have been extremely active; I have attended, participated, and conducted marketing conferences hundreds

of times in this country and abroad.

But in none of these could we ever use the soft drink industry as a case study problem because it was so different, not only because of the distribution methods used in the industry but also because in the soft drink industry, the franchisee is also a manufacturer.

Also, the marketing strategy is vastly different as no other product depends upon so complete and total availability which requires constant, continuous, and effective service. Neither do other mass-con-

sumed products use a returnable package.

In 1956, my company, the Dr Pepper Co., brought in a man as president who had been outstandingly successful in marketing in the

food industry.

His experience included flour products, cereal, coffee and the complete line of General Foods products. He was completely amazed over the dissimilarities, because in his previous experience he had been able to make comparisons—comparing previous product experience, comparing one market growth to another. He soon found out that there were no black and white situations even within the industry, much less when compared to other industries.

Now, this uniqueness is based not only on the nature of the products, but the habits of the consumers and the type of containers necessary

to insure product quality and convenience to the consumer.

It provides a wholesome product to all retail accounts and supplies the service to these accounts necessary to get the product on display or in coolers and vendors, keep them stocked regularly, and merchandises and places point of sale to create movement of the product.

Service to the retailer is the lifeblood of our industry, and one of the

strong points of this system of distribution.

It also provides the retailer with a product that turns over many, many times a year and with one of the highest profit margins of any product that he sells.

Now, even with all of this, the consumer is able to buy the soft drink of his choice at any time and at any place he desires and at a very low

price

The consumer today in Dallas, Tex., can buy Dr Pepper cheaper than he could 37 years ago when I started on a route selling Dr Pepper.

And this is on a regular price basis, and when specials are run, he can buy it much cheaper. Mr. Chairman, no other system can do this. No other system has ever done it and, in my judgment, based on 37 years' experience in this industry, and after constantly searching for a more effective way, I am completely convinced that no other system ever will.

The present franchise system is vitally needed by the Dr Pepper Co., and any other soft drink company seeking to enter the national

market and to improve its share of the market.

Now, let me hasten to put the record straight and assure you that I am not appearing here purely on a charitable basis on behalf of the franchise bottlers and the smaller retail dealers and consumers.

I am here also representing my company, its stockholders and our employees, because if this legislation is not passed and the territorial protective provisions are invalidated, our company will be seriously handicapped in it efforts to increase our present 4-percent share of the national sales volume.

The FTC case seeks to promote competition of Dr Pepper with Dr Pepper at the manufacturing level. Now, this is a business absurdity

and contrary to the interest of the consumer.

The only thing that makes sense is competition by Dr Pepper with Coca-Cola, Pepsi-Cola, Seven-Up, RC, and the other soft drink products at all levels.

If this legislation is not passed and the territorial protective provisions are invalidated, it will greatly weaken the ability of Dr Pepper to compete with the larger companies with their greater market share. Yet this, in economic reality, is the only meaningful competition.

The FTC staff's attempt to restructure the distribution system in our industry would give the larger franchise companies, such as Coke

and Pepsi, a tremendous and an unfair advantage.

They have a great advantage today because of their volume and their resources, but this is an advantage they created themselves through their own initiative, innovation, aggressiveness, and reinvestments of profits into their business, and could not be considered unfair because they have earned their present position. This we understand and respect, and it only serves as an inspiration and a challenge to us because we know if they did it, we can too—only much better.

It would have been impossible for the Dr Pepper Co., or any company, to have accomplished what we have without the protected terri-

tory clause in our franchise agreements.

Now, I would like to tell you why the Dr Pepper Co. needs a network of franchised bottlers with protected territories, rather than marketing its products through the channels used by many other food products or through bottlers with unprotected territories.

A new soft drink can obtain shelf space in supermarkets and some consumer movement by enormous, unaffordable advertising and promotion. But it cannot achieve sales development by this means alone.

The product must be sampled constantly and made available in socalled cold bottle outlets so people can try it whenever they desire

If the product is good, a consumer acceptance for it eventually develops and sales volume becomes adequate to generate a profit for the bettler.

Even when established in a market, the product must continue to be readily available in both the "cold bottle" and "take home" outlets or it will lose consumer attention.

This is the way it is for franchised soft drinks, and it is one of the

reasons why we say the industry is so unique.

The long-established route truck method of distribution, which is standard in the industry, is by far the most efficient method to serve the "cold bottle" and the "take home" outlets, and it is the only conceivable method of distributing and reclaiming the returnable bottle.

It is such an important part of the industry that I think it would be worth a few minutes of your time to take you on a typical route, with the help of a schematic drawing which you will find on the next page.

These drawings represent the type of outlets served in one day by

a route in Dallas, Texas.

Of the 21 stops, worked by the route salesman shown in the drawing, two are chains which, under the action desired by the FTC staff, would receive their Dr Pepper via chain warehouses and chain delivery trucks.

Together, the two chains account for 95 cases. The other 19 outlets account for 104 cases. In other words, 90 percent of the stops

bring in only 52 percent of the sales.

So you can see that the operating cost of the route for 104 cases sales would be almost as high as for the present route with 199 cases. Loss of the chains thereby greatly increases the cost of distribution

to the remaining outlets.

The bottler would have no choice but to raise his prices to these outlets and hope that he could hang on to the sales. Now, this might work out all right for the bottlers in the large metropolitan areas who would get all of the chain store business, but it would eventually be disastrous to the product, Dr Pepper. The small town bottler would lose all of the chain store business and have only those more costly

outlets to serve and, therefore, he could not survive, and we would

have to find a way to service that market.

Whatever method that we might work out would be more costly than the present route truck system and would greatly hinder our continued development of competition for the major soft drink brands.

In the many years I have been with the company, Mr. Chairman, we have considered and we have studied and we have tested many other distribution methods.

We have even tested the so-called and the much talked about "warehouse system" of delivery, which I would like to talk a little

about at this time.

We tested a one-way family size bottle of Dr Pepper in Indianapolis, where we did not have a franchise bottler. This test included the sale through brokers and through the warehouses of chains for

redistribution to their stores.

We learned many things from this test: One, that it was more expensive, not less, and it took a tremendous amount of advertising to get the chains to stock it. They would forget to reorder and when they did order, they would not order sufficient quantities to keep the shelves adequately stocked.

But most of all, we had no way to reach the largest segment of our

market, the so-called "cold bottle" outlets.

Then we later selected Los Angeles, where we also did not have a franchised bottler at that time, and in this test we added some elements. We distributed the one-way family size bottle, cans in 6-ounce and 10-ounce, and we also trained and developed a merchandising organization to merchandise the product at the retail outlets of those stores.

With the additional package, the manpower, and the strong advertising support, we did better than we did in Indianapolis, but we were still able only to reach a very small segment of the market and at a very high cost.

So as a result of those tests, we concluded that the only practical and effective method of distribution for Dr Pepper was through the fran-

chise bottler system.

These tests were conducted in the early 1950's.

I cannot see how any soft drink product could even get started in the market without the present truck route system of distribution operating within protected territory.

Now, Mr. Chairman, if FTC is successful in seeking to invalidate the territorial provisions in the present licensing agreements, the Dr.

Pepper Co. would be forced into forward integration.

We would be forced into owning and operating a great number of bottling plants throughout the United States, and this would happen also in varying degrees to the other brands. However, the larger companies with their greater resources would have a tremendous advantage and the industry would end up with a very few large bottling plants, all located in the large metropolitan areas, and these plants would be owned by the chains, by the franchise companies, and by large public-owned corporations.

And the small independent bottler businessman would be a thing

of the past.

Now, those reasons, Mr. Chairman, are my particular reasons why I feel that this legislation should be enacted. I am not going to comment at this time on some of the claims made by the FTC staff on industry matters, but in the full testimony submitted, I have discussed these matters and I know that you and the full committee will give serious consideration to that part of my testimony, because these things are my feelings, born of a deep conviction based on a long and broad experience in this industry.

And I am convinced that these statements are all totally supportable

by the facts in this situation.

Now, let me go to the conclusion at the bottom of page 37 and simply say that S. 3133 is a good bill. It is my hope, sir, that Congress will listen to the Supreme Court Justices and to the vast majority of the soft drink bottlers of the United States to understand the basic need for S. 3133.

The bill does nothing more than remove a serious threat to the well-being of the soft drink industry and the consumers served by

the industry.

Without it, the industry stands to be adversely restructured, not for the good of competition or the consumer, but to satisfy FTC lawyers' interpretation of the present law that a restricted territorial arrangement in the soft drink industry is illegal.

Any doubt about its legality should be removed by the passage of

this bill.

This bill will preserve these features of American life, among many other things: No. 1, a wide choice of soft drink products in package sizes and types desired by the consumer.

No. 2, the returnable bottle which provides the lowest priced product

to the consumer and reduces the litter and solid waste problem.

No. 3, locally owned and operated bottling plants in small as well as large cities, each contributing employment, taxes, and services to their community.

No. 4, convenient availability of soft drinks in small groceries as well as large chains, in filling stations, beauty shops, bowling alleys.

and offices.

No. 5, a way for new soft drink products to become established in the market and compete with existing brands.

No. 6, a way for small companies in the industry to grow.

No. 7, it will preserve a cornerstone of the free enterprise system. I want to thank you, Mr. Chairman, and the entire committee for giving me this opportunity to contribute to your committee's knowledge of the soft drink industry.

Senator Gurney. Thank you. The subcommittee certainly appre-

ciates your testimony.

You mentioned you had done these tests on the distribution system. Do you know whether any other bottlers have conducted similar tests?

Mr. CLEMENTS. I am not aware that any other franchise company has. Knowing how astute my competition is, I would imagine they have, sir.

Senator Gurney. You have not discussed it with them at trade meetings?

Mr. Clements. No; I haven't.

Senator Gurney. Does the staff have questions?

Mr. Bangert. Thank you, Mr. Chairman.

Mr. Clements, you make a very persuasive argument that the soft drink industry is a unique industry, unique from apparently other distribution systems and distribution industries, and this is why the soft drink industry should be entitled to this legislation.

I believe you were in the room when NIFDA testified.

Mr. Clements. Yes, sir; I was. Mr. Bangert. Now, there is another kind of cat. I wonder whether you think they are entitled to protection such as you are asking for here.

Mr. Clements. I am not fully familiar with their industry. I know as much about it as perhaps anyone else in this room. I only heard their testimony. I am fully conversant with our problems.

And I am thoroughly convinced that our industry needs this protection and I am sure these gentlemen are just as convinced that

their industry needs it also.

Mr. Bangert. Well, then, could we be in a situation where it is not perhaps the uniqueness of your industry that demands the need for

Mr. Clements. It depends upon what you consider as the uniqueness of our industry. I think our industry is unique in many ways, which I stated in my testimony, in that we work for total, complete availability in every type outlet from the Senate Office Building to the smallest little location in the territory. That requires a heavy investment on the part of our bottler.

He has to make a tremendous investment in plant, machinery, trucks for distribution, vending machines to service those outlets, and that is just one small phase of the differences in our industry

as applied to other distribution systems.

Now, I can go on ad infinitum, if you would like for me to. Mr. Bangert. Well, one of the other witnesses we will be hearing from today is the National Beer Wholesalers Association. Perhaps their situation is a little more similar to yours, although they do not manufacture.

Again, as I understand their testimony, they would like similar protection with certain changes that they feel would be necessary in order to protect them from encroachment by their suppliers, the brewers.

Mr. Clements. Yes, sir.

Mr. Bangert. Since there is this type of similarity between the two industries, at least as far as distribution is concerneed, I wonder if you have a feeling whether they also might be entitled to the legislation.

Mr. CLEMENTS. Again, I think I would have to say I am not totally familiar with theirs, but I think one of the major differences, which I didn't speak of a moment ago, is that our franchisee or distributorcall him what you want to call him—is a manufacturer and, again, that requires a tremendous amount of investment, and I think is another major uniqueness and difference.

You can find similarities in any distribution system. But I'm here not to speak against these other people, but to speak on behalf of my industry, because I know that our industry cannot survive without

this legislation.

Mr. Bangert. Of course, again, I guess that is the problem. Even though your bottlers have large expenditures in plant equipment, et cetera, the beer wholesalers also have large expenditures in warehouses, trucks, that type of thing.

Mr. CLEMENTS. I think we are talking about a matter of degree, Mr. Bangert, and I think again that the bottlers licensing agreement is a perpetual agreement—it's not a term agreement, it's not a one-shipment

agreement; it's a perpetual agreement.

And without the protected territory, no sensible businessman is going to make the investment necessary to build an equity in the con-

sumer franchise value of that property.

Mr. Bangert. Well, getting back to uniqueness, that is one of the points NIFDA makes in their statement, and they do it in this way. They say Coca-Cola and Pepsi-Cola or Super-Cola and RC-Cola are so different that there could not be any free and open competition with each other.

I am wondering what your feeling is along this line.

Mr. CLEMENTS. I'll just say they have not been in this industry. There is free and open competition. You have never seen competition until you compete or attempt to compete in the soft drink industry. It's a highly competitive industry.

Senator Gurney. The Chair observes there is a vote in the Senate which I will have to leave for, and the subcommittee will recess during

this time, subject to the call of the Chair.

(Whereupon, a recess was taken.)

Senator Gurney. The subcommittee will come to order. We will

resume with the testimony of Mr. Clements.

Mr. Bangert. Mr. Clements, in your statement you point out that franchisees took on Dr Pepper because this would increase their sales volume. You also pointed out the fact that two experiments in Indianapolis and Los Angeles failed, I guess, in part because you could not service cold bottle outlets.

I would assume that the cold bottle outlet having that type of availability would give you greater advertising coverage, or greater name

coverage.

Mr. CLEMENTS. That is a part of the problem. The other part of the problem is that, in introducing a new product in the market where you are cultivating taste habits, the best way to get an individual to try their first drink is one at a time. With the cold bottle account, it is much easier to get them to do that than it is to pick up a six- or eight-pack and carry it home.

So it is important volumewise because it is the largest single segment of our business. It is important in market development of a consumertaste habit to have total availability and the cold bottles are essential,

the so-called cold bottles.

Mr. BANGERT. I wonder if maybe there might be a way out of this dilemma. You indicate in Dallas you traced the route of a truck that would make deliveries. You cannot help but wonder whether or not that route is not sort of uneconomical when it stops and drops one case of Dr Pepper here and three cases there.

I am wondering whether or not it might not be more economical if there would be one truck that could stop at all these places and

deliver several sodas—Dr Pepper and Coca-Cola and Pepsi-Cola, the

Mr. CLEMENTS. That is done in our multiple-brand franchise plants. The reason they are interested in another brand is in order to increase their volume to make these marginal accounts profitable.

We have routes that service nothing but the so-called cold bottle accounts in downtown areas. But in setting up a route distribution system, you have to set it up on the most efficient methed possible, to cover the least amount of miles, because the measure of profitability in this industry is the number of cases sold per mile driven and per stop made, on an average.

Mr. Bangert, Would the large buyers, such as your chains, be, in

effect, now subsidizing the smaller buyers?

Mr. CLEMENTS. No, sir; they are not now subsidizing the smaller ouvers.

Mr. Bangert. Why?

Mr. CLEMENTS. We can see no feasible possible reason why you could assume that they are subsidizing them. They buy at the same price the other outlets buy at, they get the same service the other outlets get, they get the same high degree of quality, the same merchandising help, the same advertising support.

They get all of the things that go to make up competition, and they

pay the same price that the others do.

Mr. Bangert. But if they are buying large quantities and they are buying large quantities at the same price as the small convenience store which may be buying in small quantities, are they not, in effect, subsidizing?

Mr. CLEMENTS. No, sir.

Mr. BANGERT. Do you not get certain economies by having the large account?

Mr. CLEMENTS. You get the economies. The economies come from your total volume, spreading your overhead over the entire volume. Servicing the entire territory is one of the prerequisites of a successful development of a territory.

The equal price, I think, is the fairest way to the small dealer as

well as to the large dealer.

Someday the small dealer—and I have seen many of them, they start out with a one case stop and build their business to where they become big, so-called big outlets.

Mr. Bangert. One of the things that has been talked about during the course of the hearings is the problem of a bottler being able to

sell to a warehouse in his territory.

We had a witness this morning a 7-Up witness, that talked about it; and also during our last set of hearings, Los Angeles Coke, which is one of the largest Coke bottlers, talked about it. Both of them seemed to agree on one point; that is, they thought they should be allowed to sell to a warehouse in their territory, even though that meant the product was going outside their territory.

I am wondering what your feeling is on that.

Mr. Clements. That is like becoming a little bit pregnant. The minute you start that there is no way that you can assure your neighboring bottlers that they have protective territories.

Then we become in violation of our legal agreement which we have in effect with them.

Mr. Bangert. How can you legally stop someone from selling in his

own territory?

Mr. CLEMENTS. We have a contractual agreement with him that says he sells for distribution in his territory. We grant him, Mr. Bangert, the right to use our trademark in that territory and in that territory alone.

Mr. Banger. Apparently, again from the testimony of both Los Angeles Coke and from the testimony of the Taft, Calif. Coke dealer, the product of the hos Angeles Coke dealer was nevertheless being sold to the warehouse in Los Angeles, and finding its way out into the surrounding territories.

It seems like what happened, at least in that case, was that the big bottler, the big Los Angeles bottler was able to do this; but the smaller

bottlers could not raid the other territory.

Mr. Chemes is. With our franches bottlers, we treat them all equally, little, small or large. The large bottler would not be any more permitted to do so than the small bottler.

Mr. Bangert. Have you found yourself in a position of having to

restrict a supplie of spray to any of your borders:

Mr. CLEMENTS. No. sir; Mr. Bangert. I am in the business of selling, sur; and I encourage them to buy more. The only time I have had to restrict service is when the suppliers were rationed during World War II.

Mr. BANGERT. Well, what if a bottler that normally bought 50 galless, some in a given period would all of a sudden put in an order

for theer 1.0 gallons of sirup, would you honor that!

Mr. Clements. Sure.

Mr. Baxoner. Would that make you suspicious he was selling to

places you did not want him to sell to?

Mr. Clements. No, sir. We are not isolated from our customers. We have a great communication. We have the confidence of our bottlers. We have built our business on integrity. We know what is going on in the territory.

Mr. Bangert. Do you have an obligation on the part of the parent

company to provide advertising in national and local markets!

If so, I am wondering how it works.

Mr. Clements. Our license agreement sets forth our requirements, stating that we agree to do certain things; and it sets forth the things

that the franchisees, the bottlers agree to do.

We do agree to advertise the product. We have a national advertising program which we plan ourselves. We develop all the creative advertising that is used both nationally and heally in order to protect the franchise and to make sure the claims that are made about our product are true.

Then we match funds with each of our 512 franchise bottlers. Those funds are based on the anticipated gallonage that we will do in that market that year. We present our program nationally to our bottlers

the first of October.

Then between October 1 and January 1 we sit down individually with each of these 312 bottlers to develop the effective use of those

funds in his market, totally integrating each of those 512 individual

local programs with our national program.

Mr. Bangert. Some of the syrup companies in the parchave entried point—and I think you made a point—that product availability in the cold bottle outlets was essential, even though it was sometimes a marginal operation on the part of the bottler.

I am wondering whether this type of distribution is viewed by you as promotional or advertising, and whether or not you may consider compensating the bottlers if they take too big a less on that par-

ticular distribution scheme.

Mr. CLEMENTS. We do not compensate the bottler. He is an individual. He is an independent businessman. He owns his business. We are not a parent company. We are a franchise company.

Mr. BANGERY. So that you figure that, if he is losing money on that

area he should be able to make it up on other areas?

Mr. CLEMENTS. As I said earlier, Mr. Bangert, the profitability of an operation comes from the total volume; and he may certainly have certain outlets, while he is developing the volume in those independent outlets that are not profitable, in order to develop the overall volume. He continues to service those because unless he services those, he would lose not only the business he would be getting there, but he stands a chance of losing a continued use of his product by the man drinking something else there and maybe liking it better.

Our industry is highly competitive. Just because there are a few colas and because there is this and the other, the colas are highly competitive with each other, and we are highly competitive with them.

Mr. BANGERT. One other point that I think you have made and which also the manufacturers have made is that the reason the exclusive territorial allocation system is so valuable is that this makes sure that the bottler does, in fact, work his whole territory, and does, in fact, service his whole territory, all potential accounts.

Now, Commissioner Nicholson, in testimony that he will give later, suggests that maybe this could be done by an area of primary re-

sponsibility. That would say to the bottler:

You have to go out and you have to work this recritory, and you have to do it to the best of your ability, and you have to do it to our satisfaction. If you do not work this territory completely, then we can take your franchise away from you.

I am wondering whether or not that would not colve at least that

problem, as far as saturation of the marketplace is concerned.

Mr. CLEMENTS. It would not solve the problem totally because, for example, in our company we do 60 percent of our volume in these outlets you are talking about—our bottlers do 60 percent of their total volume through these types of outlets.

If they attempted to serve only those outlets that you are referring to, then their business would drop 60 percent, and their total busi-

ness would be unprofitable.

Mr. BANGERT. Could you not require them to serve the whole 100

percent?

Mr. CLEMENTS. Under their agreement today they are required to

some all of them.

Mr. Bangert. Could you not require them under something less restrictive; namely, the area of primary responsibility?

Mr. Chimints, I think you are asking me a legal question that I

do now feed I should answer.

Int I feel that our present agreement is the fairest agreement for Loch the bottler and the franchise company. It gives him all the protection be needs, and gives the company all it needs; it does not discriminate favorably or unfavorably to any group of his customers.

I think what you are suggesting would, sir.

Mc. Bakemer. Oftentians, when providing for antitrust exemptions such as is provided on this bill, the argument is made that the industry is in bad some financially and, without some element of a legal monopoly, that industry will go under.

On the other hand, economists (estifying before this subcommittee in a lot of writings—for instance, the case in Turner—would define monomy profit, concething like a 15-percent investment over a period

of time.

Now, in the material we requested from your company, we received some financial statements. We found that parent company's return on his statement was about 2° percent for 1°70-71, putting it in the same category with drug companies and General Motors.

We also found that one of the bettlers' returns that we examined was about 274 percent, which is about twice what the antitrust and com-

nurce say are in licative of monopoly products.

I wander whether or not these kinds of figures argue persuasively

that this bill is needed.

Wr. CLEMENTS. You are talking an area that is legal; one that I am not fully familiar with. I do know this: If this bill is not passed, the independent of the bottlers will be forced out of the business.

Mr. Cruweris. If counsel will yield—the Federal Trade Commission testified and said that in 1947 until today 5,300 bottlers dropped to about 2,300. So that belies that all bottlers are making a lot of money otherwise, you would not have almost a 100-percent drop in the mall bottlers.

That is what this bill is to protect. This bill is not here to protect the second rescale in Cake and Seven-Up and so forth. This is to protect the small bettler, to protect his exclusive territory.

One bottler managed to make 27 percent. There must be some

special reasons why be was making that.

This Lill is here to protect the fellows who dropped from 5,300 to

2.300—whatever the record reflects.

Coca-Cola testified—Mr. Smith did, that 2 years ago they had over 17,060-range Cole Lottlers. Today they have only 800, so there is a number of 250 franchisees that are going out of business. Certainly they did not make any money.

Mr. Commerces. I think that is true of our industry in general. I do not question the fact, but I would say it would have to be an extreme

exception. (Addressing Mr. Bangert.)

Mr. BANGERT. Well, slong the lines of your experience in this business, Dr. Pepper is, I guess, 87 years old; and this puts them about in the ball game with Coke insofar as how old they are.

Yet, to date, you have been able, with your exclusive territories, to catch only about 4 percent of the market. I wonder, with that kind of

track record, what makes you think that an exclusive territory will

give you more of the market?

Mr. CLEMENTS. The track record that you allude to goes back to 1885. The Dr. Pepper Co. was organized in 1923, and even in 1926 they only did \$48,000 in sales.

Really, if you want to look at the track record and know why I am so thoroughly convinced that the protected territory is important to

us-look at our last 5 years, look at our last 10 years.

The others were smarter, they worked harder, they got started long before we did. But in that recent period we have been growing at a rate of two or three or four times that of the industry. With the protected territory we have been able to invade these markets—the large metropolitan markets in the East and in the North—that we had never been able to invade before.

We have been able to move in there and offer competition to these giants; have been able to start increasing our share of the market.

We are convinced, based on that history, based on our present marketing strategy and program, that we are going to do even better in

the future if the protected territory remains legal.

Mr. Bangert. That is one of the points Professor Turner made before this subcommittee: that perhaps exclusive territories should be granted to new companies breaking into the business, companies that have not obtained a certain percentage of the market, in order to permit them to get into the market and stay in the market and offer competition to people that are already in.

I am wondering if you see any value in consideration of some kind

of a market figure for permission of exclusive territories.

Mr. CLEMENTS. No. sir; I do not. If it is limited as to the development, limited as to the time that that agreement will be valid, no independent businessman or bottler is going to make the investment necessary in this industry to develop a consumer franchise for that brand name in his territory.

I think it has to be a perpetual agreement, and I think it has to

be all inclusive—that all competition has to be included.

Mr. Bangert. Would not the use of exclusive territories across the board give established companies a competitive advantage over new companies coming in or companies that are just starting to grow?

Mr. CLEMENTS. Quite the contrary. I think it gives the new companies starting to grow an advantage over the long-established plants. If you had no protected territories, they, with their greater consumer acceptance, their greater resources, would have a tremendous advantage.

Mr. Bangert. I guess, as you indicated, this is a way that you are able to get into that territory. You alluded to your recent deal with New York Coke, that you were able to get into New York by piggy-

backing, really.

What I am wondering is: What do you do in that arrangement? What obligations did you have to meet in order to have a New York Coke Co. agree that they would take your product?

Mr. CLEMENTS. The same obligation we had with Tucumcari, N.

Mex., our first Coca-Cola bottler that acquired our product.

We agreed, along with our licensing agreement, to work with him

in the development of the territory, and to provide matching funds for the development of a consumer franchise in that territory.

Mr. Bangert. What did it cost you to get into New York?

Mr. Clements. That is a figure we do not think our competition, sir, has a right to know.

Mr. Bangert. But you did at least pay something to get into that

area!

Mr. Clements. No, sir. When you say, "pay something," the answer is no, sir.

Mr. Bangert. You match funds with New York Coke?

Mr. CLEMENTS. We do that with every bottler we have, sir.

Mr. Bangert. One of the arguments that is given for this bill is that it is necessary to protect the small bottler. Yet, during the course of these hearings, we have heard from at least certain sourcethat the small bottler is on his way out anyhow, because of technological developments.

Coke, I believe, estimated that a plant, to be minimally efficient, must produce a million cases a year. We note that one of your vice presidents, Mr. Robert L. Stone, in November of 1970, was quoted

in the Soft Drink magazine as saying:

We are probably only about half-way through the cycle of acquisitions. mergers and consolidations of bottling plants. It is indicated we will drop to about half the current number of soft drink manufacturing plants.

When we do, probably most of the remaining 1,600 or so will be franchised distributors, rather than bottlers. By that time production likely will be reduced to substantially a small number of high speed production centers.

Then he goes on to describe the efficient use of these production centers. I am wondering if we are kidding ourselves by saying that the small bottler is going to stay alive with this bill.

It looks like the trend of the industry is toward consolidation.

Mr. Clements. I would have to agree, the trend of the inclusive has been towards consolidation and mergers. That is the result of the economic squeeze and it has followed an orderly transition. Wherever the small bottlers have had to get out of business, they have been able to sell their interests to surrounding bolders to regain their investment and a profit on their investment. They have been able to get a substantial sum for their franchice value, which is the greatest asset that they have, far greater than their physical resources.

So that is true. It will continue as long as inflation increases. It will

continue as long as technology improves.

But it will be an orderly business transaction; whereas the surviving bottlers will pay a fair price for the bottler's business that he purchases.

Mr. Bangert, Certainly, I can understand that argument. In terms of the bottler himself, the small bottler, I think probably you are right.

But that exclusive territory does give him something to sell, something that he probably would not have if he had only his plant, equipment, assets to sell, because I would assume that, if you go into highspeed efficiency operations, you may not want those anyhow.

So you are buying a territory; and I do understand that.

I am wondering if this bill is passed, will we not ultimately in the future be in a situation where we are saving, "Okay, now, this protection that we passed back there in 1972 or 1973 has been meant to be given to small bottlers. But now that protection applies to the 75 Coke bottlers that are left."

By that time, these would really be pretty big operations to be pro-

tecting from competition.

Mr. CLEMENTS. That is an assumption that I think is unwarranted by the facts of the past, and are unwarranted by the conditions that

will exist in the protected territories.

Many of our bottlers—you call chem small—are in small towns. They will survive. Many of the so-called bottlers in small towns are very profitable. But without the legal territorial protection, these bottlers cannot survive, because the large city bottler is going to get all the business.

They will not need to buy his franchise value or his territory. They will invade it and take the besiness. So you are wiping out—or FTC would wipe out, if this bill is not passed, any chance he might have for

recovery.

If the bill is passed, we are guaranteeing that the industry has an opportunity to continue to build their business; that each individual bettler has an opportunity by his own ingenuity and aggressiveness to develop his territory. Many of the small city bottlers will still be in business.

Mr. Chumbris. If counsel will yield.

This bill is intended to protect the small bottler. We heard some testimony in the first 3 days of the hearings where some questions were

raised about how some small bottlers felt.

During the recess, I went down to what I consider smaller cities, starting with Raleigh, Durham, Greensboro, (Winston-Salem) Danville, (Mar insburg), (Reanoke) and on to Lynchburg and Charlottesville, Va.

Now, in reviewing some of the questions Mr. Bangert has asked you

relating to a million cases, one bottler of Canada Dry said:

I know a man who handles 350,000 cases a year, and it has been a profitable business for that family for a long time. But I know of another man who came in and took over a franchise of a million and a half cases and, within two and a half years, he lost his franchise.

He was not able to operate profitably, which goes to prove a point I think people have been trying to stress.

Do you have the efficiency! Do you have enough cases per mile! That

is why you take on a second and a third brand.

One of the other persons stated that one of the reasons that he now has three franchises, instead of the one he started business with—perhaps 30 or 40 years ago—is because he found out he needed more cases to put on his track to make that mile more productive. Every mile he went he could reduce his cost by having a second or third franchise.

We may come to what Mr. Bangert indicated. Thirty or 40 years

from now we are going to be confronted with that problem.

This bill is to stop us from reaching that point. If it ever reaches that point, Congress can always say, "Well, this bill is no longer needed," and repeal it, like they have repealed others.

Mr. CLEMENTS. Thank you very much. I would like to elaborate a

little bit on this so-called "magic million" cases.

One of the most prairible for Pepp r Lottlers I know, his total volume is less than 200 to 0 cores. Size is relative. Volume is relative to the size of the territory Le serves, the number of trucks it takes to very ice that territory, and the equipment.

A million-case plane in New York City would not be very profitable. A million-case plant in Guinesville, Ela., would be very profitable.

Mr. Bangert, But you do not disagree with the statement, I assume and maybe you do- vice president Stone indicated you were going to drop half the number of current soft drink manufacturing plants.

Mr. CLEMENTS, Mr. Stone was making his own individual prediction, based on his own interpretation of the factors that have happened

Mr. Bangert. You disagree with it?

Mr. CLEMENTS, Yes, I do. Just Lecause Mr. Stone or Mr. Smith or

I would say it does not mean that is note sarily true.

Now, I think we have seen a trend in the industry—and that is the only way we can forecast what might happen in the future, by what has happened in the past.

I have stated to you that I think we will have fewer. But I think it

will be an orderly transmission.

Senator Gurney. Let me ask a question here.

The discussion centers around the fact that smaller bottlers are going out of business. What about the territories themselves, the distribution

territories? Are they getting larger along with the bottlers!

Mr. CLEMENTS. Yes, sir. In most cases they are, and that is where many of the acquisitions or mergers come from. With improved highways and better vehicles for transporting the product and with highspeed machinery requiring greater volume, many of the bottlers have either merged with a neighboring bottler to cularge their territory or have purchased the neighboring bottler.

That is one of the ways they grow; yes, sir.

Senator Gurner. And then the bottlers will get in line, perhaps, in

order to service the large franchise?

Mr. CLEMENTS. Yes, he can grow that way by acquiring additional franchises. Certainly, the way he should always attempt to grow is through vertical development of the sales of the products he has.

Senator Gurney. The reason I asked the question—the bill is designed to protect small bottlers. It is also equally designed to protect the franchise distribution system, which I understood your testimony to be in line with.

Mr. CLEMENTS. Yes, absolutely. Senator Gurney. All right.

Mr. Bangert. In the area—again, getting back to intrabrand competition—and I have a few more areas and then I will be finished.

Mr. CLEMENTS. That is all right, sir.

Mr. Bangert. You indicate there is intrabrand competition. Certainly going back to the New York situation, where you went piggyback with Coke, there was competition in the sense that the consumer was offered a new product that he had not been offered before.

Mr. Clements. Yes.

Mr. Bangert. So there was something made available to the consumer. I think in terms of that kind of competition you are absolutely right.

But in terms of price competition, how realistic is it to expect that Coke of New York is going to compete with themselves, pricewise, in the sale of either Dr Pepper or Coke?

Mr. CLEMENTS. Mr. Bangert, I am sure that you realize that price is only one of the many factors of competition. I am sure you realize,

too, that price is based upon cost.

His cost or any other Dr Pepper bottler's cost of the ingredients, manufacturing, the overhead—the ingredient cost of Dr Pepper is basically the same as the ingredient cost of Coke.

He uses the economic factors that any businessman arrives at in pricing his product. He is going to price that product according to his

costs.

Now, price competition is prevelant in our industry. Price competition is prevelant at the retail level. We have intrabrand competition at

these retail outlets.

Let me take that one step further if I may, and explain and elaborate on your question. When we franchise a bottler of another name brand, we do not just franchise him and forget him. We franchise him. We work with him. We sit down and establish programs that he commits to and we commit to, and we match funds that will make our product competitive; that he will promote Dr Pepper at certain periods during the year; a certain amount of advertising will be spent.

So the competition is increased, not decreased, just because of the

fact that he has it.

Now, without Coke or some other bottler in New York, we would

not be in New York, and that competition would not be there.

Now, let us just assume for a moment that we were not able to franchise any bottler in New York. We had to go in there on our own and establish a plant. We are not going to be able to be nearly competitive as we would be going in with an established bottler, who already has an established facility, already has distribution.

We can immediately get distribution, and then we get to work on

spending money to be competitive.

Mr. Bangert. Again, on price competition, when you entered the New York market, your being there did not cause a decrease in price of other competing beverages; is that right?

Mr. CLEMENTS. That is right, and it would not have if we had been

thereby ourselves either.

Mr. Bangert. One of the things that may disturb me about your argument to the effect that the manufacturer, himself, bases his prices on cost and, therefore, he is going to give us a fair price, is that in the areas that the subcommittee has examined, where you have had a raiding of territories—namely, the situation in Los Angeles where they were shipping from Denver all the way into Los Angeles—there they were selling below the Los Angeles Coca-Cola Co.'s price, even though they had the additional cost of the shipment.

· Again, in the situation in Boston, Soda Hut started buying from outside their territory, and bootlegging it into Boston, where they were selling considerably below the area price that the four bottlers who

owned the Boston area would sell.

So, with that type of experience, I wonder whether or not that type of intrabrand competition can cause the price to decrease and was not advantageous to the consumer.

Mr. CLEMENTS. I would say it did not, based on our experience, based on our investigation of the Los Angeles pricing situation, to which you referred.

The retail price to the consumer—and that is the one I presume you are interested in—was very little less and in most instances the same

as products he received from route sales deliveries.

I have not been able to get the cost of warehouse distribution totally, because they do not know it either. But in the facts that I have been able to gather, the warehouse distribution is not going to save money; therefore, it is not going to reduce the price, because the chainstores work on margins.

I might just add one step further to this, sir: and that is in Dallas, Tex., and in most every major market throughout the country, you can buy soft drinks that retail on weekends cheaper than the wholesale

price.

Mr. Bangert. Again in Boston, Soda Hut, in their ads to the public, quoted their prices: Coke or Tab twenty-four 12-ounce cans at a price of \$2.79 a case; where the regular supermarket price at that time was \$3.56 a case.

Mr. Clements. Just a few weekends ago Kroger sold it for 57 cents

a case

Senator Gurney. Is that not probably a frosting on the case.

Mr. CLEMENTS. It definitely is. It is an isolated situation.

Senator Gurney. Once you get started, everybody could get in that business.

Mr. CLEMENTS. I think that is what you have spasmodically, and then the price ultimately will go up. He makes that investment to make a profit.

Mr. Chumbris. Would you yield, Mr. Bangert?

We have been talking about the wholesale price, what the bottler will sell to the chainstore or to the gasoline station or to the mom

and pop store.

The consumer is interested in what price the retailer will sell. There could be a variance. There may be some reason why the bottler who bottles the drink may, for some reason, either raise or lower his price to the store; and the store could choose to do just the reverse.

He could take the price that has been dropped and increase his price;

or just vice versa.

We have been talking too much about what the bottler charges rather than what the retailer charges, which is what affects the consumer.

Mr. Clments. He probably would, because he is more interested in

selling his private brand than the national one.

Mr. Bangert. The last question I had sort of relates to this. You have indicated—and other witnesses have indicated—that the lower prices per ounce for various soft drinks today, when compared to 30 years ago, are lower.

I assume that at least part of this is due to the use of larger contain-

ers: is that correct?

Mr. Clements. Yes, sir.

Mr. Bangert. I am wondering what role, if any, has the cost of syrup played in this. How does your price compare on syrup today with the price 30 years ago?

Mr. CLEMENTS. I do not have the price structure of 30 years ago, but it is comparable. I can give you an accurate figure on 25 years ago.

The price of my ingredients to my franchise bottlers is 11½ percent lower today than it was then, sir.

Mr. Bangert. Just for the record, what do you charge for a gallon

of extract?

Mr. Clements. It is the equivalent of 88½ cents a gallon for finished syrup. He puts sugar in the extract, makes a finished syrup. He then makes it into the finished Dr Pepper product.

That is 88½ cents a syrup gallon.

The period I referred to—25 years ago we charged \$1 for that same ingredient, so we are 11½ percent lower today than we were then.

Mr. Bangert. Thank you.

Senator Gurney. Mr. Chumbris?

Mr. Chumbris. Thank you, Mr. Chairman.

Time is running late; therefore, any questions I would like to ask you, because you are so knowledgeable in this area, I will have to

forego

But one fact has been brought up in this hearing—for example, vesterday—there were three bottlers. One of them stated 53 percent of his product went to chainstores. So if the chainstore should move to warehousing, he would be affected. The other had 35 percent of his product and the third a little bit more than that which went to chainstores.

But there was no comparison made to the fact that private labels, as I understand it, worries a lot of bottlers, because in some chainstores 80 percent of the space in that chainstore is devoted to the private label; and the rest of the bottlers have to fight for the remaining 20 percent.

So they have a tremendous problem with private labels; is that so? Mr. CLEMENTS. Very true. They put out a schematic drawing of the amount of space that must be allotted to their private brands. The

rest of us have to fight over the balance.

Mr. Chumbris. I do not want to prolong the question further, except that I think one of the convincing things that I found on this short trip, talking to these small bottlers, was the fact that in some small towns in North Carolina—especially North Carolina—a family has had a bottling business for some time. Their franchise is only within the confines of a small town.

They have been in business a long time. If they lose this exclusivity—Raleigh, Durham, Winston-Salem, and Greensboro—would swoop down on that fellow, and he would not be in business at all.

Is that correct?

Mr. CLEMENTS. That is true. The majority of our business is still owned and operated by family operations, many of them in their fourth generation.

So they could not survive without the protected territories.

Mr. Chumbris. I imagine there will be some letters from State soft drink bottlers organizations pointing out how many bottlers in their State feel that the bill we have here ought to become law.

Thus far we have had three witnesses who are small botlers who come in and say, "We do not want the bill," and three other witnesses

who say, "We do want it."

Somebody would think that is a 50-50 proposition. I think the record ought to reflect how the 2,300 bottlers who are now in business feel about this bill.

It is impossible to listen to them all.

Mr. Clements. I think that is very true. Mr. Chumbris, so far as I know, I have never talked to a bottler who is not in faver of this legislation. I would guess that there are others, besides the time hat have appeared here. I know that the vast majority of bottlers are extremely concerned about this legislation and are anxiously hoping that it will be enacted by Congress.

Mr. Chumbris. Thank you, Mr. Chairman.

Senator Gurney. Do you know how many other—approximately how many other companies there are like yours; that is, a small com-

pany in this business, as opposed to those as large as Coke?

Mr. CLEMENTS. I believe, Senator Gurney, that there are about 57 smaller franchise companies; and there are only three or four that we term as large franchise companies. We are seeking to get out of that smaller category.

Senator Gurney. The point of my question is: Are there a let of

other companies in a similar situation as yours?

Mr. CLEMENTS. Yes, sir, there are, and I think probably eque ty, if not more vulnerable than we are.

Senator Gurney. Thank you very much.

Mr. Clements. Thank you for your courtesy and the opportunity. Senator Gurney. Do you have a statement, Mr. Nicholson!

# STATEMENT OF JAMES M. NICHOLSON, NICHOLSON & CARTER, WASHINGTON. D.C.

Mr. Nicholson, Yes; I have a statement that I submitted, I would like to go over it lightly, and touch upon a few of the points that I think have been raised today.

Senator Gurner. Yes; would you identify yourself for the record?

Mr. Nicholson. Yes.

I am James M. Nicholson. I am a partner in the law firm of Nicholson & Carter, in Washington. I am a former commissioner of the Federal Trade Commission, having left at the end of 1970. Senator Gurney. Would you like to have your statement placed

in the record at this time?

Mr. Nicholson, I would. Senator Gurney. It will be.

(The document follows. Testimony resumes on p. 551.)

### BIOGRAPHICAL SKETCH OF JAMES M. NICHOLSON

James M. Nicholson is a partner in the law firm of Nicholson & Carter, 21 Dupont Circle, N.W., Washington, D.C. 20036. Mr. Nicholson served two years as a Commissioner of the Federal Trade Commission and prior to that time practiced law in Indianapolis, Indiana. He is a graduate of Knox College, Galesburg, Illinois (A.B.) and the Law School of the University of Michigan (J.D.). Mr. Nicholson is a member of the Bar of the State of Indiana, the District of Columbia, various Courts of Appeal and the Supreme Court. He is a member of the American Bar Association Sections of Antitrust Law, Administrative Law, Corporation, Banking and Business Law.

STATEMENT OF JAMES M. NICHOLSON, NICHOLSON & CARTER, WASHINGTON, D.C., ON S. 3133 AND SIMILAR BILLS

September 14, 1972.

Mr. Chairman, members of the subcommittee, I appreciate this opportunity to appear before you to comment on the proposed legislation which is the subject of these hearings. Essentially, these proposed bills would establish an exemption from the antitrust laws for certain exclusive territorial arrangements involving

trademarked food products.

Before explaining my position on the propriety of this proposed legislation, I think it would be helpful to summarize the context in which these hearings are taking place. On July 15, 1971, the Federal Trade Commission issued a series of complaints against the major soft drink manufacturers, alleging that exclusive territorial restrictions governing the operations of their franchised soft drink bottlers are unlawful under Section 5 of the Federal Trade Commission Act.

The FTC complaints allege that the territorial restrictions are unlawful, both under per se rules of illegality (i.e., without regard to their competitive effect), and under the "rule of reason," which requires an economic inquiry to determine whether the restrictions are unreasonable in light of the peculiarities of the soft

drink market.

In their responses to these complaints, the soft drink manufacturers contended, among other things, that the FTC proceedings were deficient in that the parties whose interests were most directly involved—the franchised bottlers—had not been joined as respondents. To allow the bottlers an opportunity to present their views, the FTC hearing examiner accorded them intervenor status. Thus, the stage appears to be set over at the FTC for a full exposition of the complex legal and economic issues raised by these complaints.

As a collateral line of defense, however, certain of the soft drink manufacturers and franchised bottlers have launched a legislative program to preempt the FTC proceedings by establishing an antitrust exemption for the challenged territorial restrictions. This program has resulted in the five proposed bills now

being considered.

Finally, on July 31, 1972, the FTC staff moved for a summary judgment of illegality on the *per se* theory, which motion is currently pending before the hearing examiner. An analysis of the most directly relevant Supreme Court precedents indicates that the FTC could ultimately prevail on the *pre se* theory, although it is unlikely to obtain summary disposition of a complex antitrust case.

With this background, I submit my opinion that the proposed legislation is not in the best interests of effective antitrust enforcement and is likely to do far more harm than good because it would operate to preclude a detailed legal and factual inquiry. This view derives from the lack of clear and convincing evidence that an exemption is warranted in this case, it being my conviction that any such special interest legislation must be based on such evidence. The one inescapable conclusion that emerges from the extensive record of testimony thus far is that the competitive impact of these territorial restrictions cannot be properly assessed without first resolving a number of complex factual issues—a task which can only be accomplished through the adjudicatory process. The following examples will illustrate:

1. All parties to this controversy appear to agree that concentration in the bottling industry is increasing. However, proponents of this legislation contend that the rate of concentration will be increased by the removal of territorial restrictions, arguing that the larger bottlers will rapidly take over the territories of the smaller bottlers. On the other hand, the FTC and some of the bottlers contend that removal of the restrictions will have the effect of decreasing concentration by freeing the smaller bottlers to invade the larger territories. Both points of view appear to be supported by persuasive evidence, and the truth obviously lies somewhere in between. While some of the smaller bottlers will likely be absorbed by more powerful bottlers, others, freed from territorial restrictions, should be able to grow and prosper at the expense of their larger neighbors. However, the overall long-term net effect on competitive conditions in the soft drink industry, which includes a variety of business entities in addition to bottling plants, is far from clear at this early juncture—as is the probable ultimate impact on the consumer.

2. The FTC argues that removal of the territorial restrictions, thereby introducing intrabrand competition, will logically result in lower prices. Further, the FTC contends that wider use of central warehousing, with its efficiencies of size, will contribute to lower prices. In support of the need for lower prices, the FTC points out the price differentials that presently exist in some trade areas and the rapidity with which prices have risen in recent years. Proponents of this legislation contend, however, that soft drink prices are already at very low levels and have been for some time. They contend further that in increased concentration and wider use of the central warehousing-food chain distribution channel will result in higher overall prices.

3. Proponents of the legislation contend that expanded use of central warehousing will result in the elimination of returnable containers, which apparently retail at about 30 percent less than "one-trip" containers. From this, they conclude that successful FTC action will result in adverse ecological consequences and rapid price increases. On the other hand, those seeking to remove the territorial restrictions argue that public demand for returnable containers can compel their use and point out that at least one major food chain uses returnable containers even for its private label brands. In any event, they contend that advanced recycling techniques would mitigate any ecological impact.

It appears that those seeking to remove territorial restrictions could also argue that such action would even promote the use of returnable containers. With a 30 percent price differential, it would seem that a small, local bottler could compete quite effectively with an invading larger bottler through the heavy use of

returnable containers.

4. Proponents of this legislation argue that increased use of central warehousing will result in the loss of many small accounts (e.g., corner grocery stores), thereby reducing the overall volume of soft drinks sold and narrowing the number of outlets available to the consumer. However, the soft drink manufacturers might well offset any such possibility by assigning areas of primary responsibility to its licensees and insisting that they provide adequate sales coverage and service within those territories.

5. Proponents of the legislation characterize the soft drink bottling industry as a localized, small business operation. However, while it is true that the industry includes a large number of small businesses, it also includes some relative giants, including a number of major conglomerates who have entered the field through acquisition. Obviously, much more than the preservation of small

businesses is involved here.

In this connection, it should be noted that competitive practices valid at one point in an industry's development may be invalid at a later stage. Proponents of the legislation have emphasized the point that exclusive territories have in the past provided incentive for independent investors to take the risk of establishing bottling facilities. In the early stages of territorial development by soft drinks, such restrictions may have been a reasonable assist necessary to enable soft drinks to break into the overall beverage market. However, the soft drink industry is now a major, thriving sector in the food industry, with products distributed in every corner of the United States and annual revenues of approximately \$5 billion. At this point, the protective mantle of territorial restrictions may not be supportable for the same reasons.

The parties involved in the FTC litigation have, by now, generated a great deal of economic and statistical data, much of which may be highly relevant in resolving important factual issues such as those just listed. Some of this data has been cited in support of the many factual assertions which have been made during the course of these hearings. However, none of that material has yet been subjected to the rigors of the adversary process, where cross-examination—as well as direct testimony from chain stores, wholesalers, small grocery outlets, and others—is likely to reveal any number of errors, inconsistencies, and half truths. The same is true with respect to the oral opinions of industry and expert

witnesses.

Apart from the above difficulties, these hearings are ill-suited as a vehicle for the resolution of the complex legal and factual issues involved because the focus here has been limited to the impact on the bottling industry. Yet it is the soft drink manufacturers, themselves, who are the respondents in the FTC proceedings, with the bottlers appearing only as intervenors. This may well be appropriate, since it is the manufacturers who control the distribution of trademark licenses, allocate territories, and bear the responsibility for policing any violations of the territorial restrictions. In order to properly dispose of the issues raised by the FTC complaints, the role of these manufacturers in the distribution system must be thoroughly examined and the extensive relevant material contained in their files, which has been, or will be, obtained by the FTC through the discovery process, must be subjected to judicial analysis. It appears that the manufacturers intend to defend vigorously the FTC action; it is through this process of litigation that the legality of the territorial restrictions should be determined—not through legislative fiat.

As noted above, the FTC staff has moved for summary disposition on the *per sc* theory, and there appears to be some chance, in light of recent Supreme Court precedents, that the staff may evenutally obtain a *per sc* determination of illegality. However, I do not believe that any such ruling is likely to be obtained

via summary procedures. The factual distinctions between this case and the applicable precedents are sufficiently weighty that the FTC, even if it were inclined to rule on a per se basis, would almost certainly insist that a record be developed in which a "rule of reason" determination could be made in the event a

per se rationale were rejected.

On the other hand, enactment of the proposed legislation would automatically preclude any judicial inquiry, per se or otherwise, into the legality of these restrictions. This would clearly be contrary to the public interest in a situation such as this, in which there are many factual and legal issues that have not been resolved, as well as some that have not even been explored. Further, enactment of this type of legislation could severely and unnecessarily disrupt the entire mechanism for the development of antitrust policy. Frustrated by legislative pre-emption in this important case, the government will almost certainly bring a similar case within a short time, and a new set of respondents, seeking to take advantage of this clear precedent, will initiate a barrage of special interest legislation. Beyond that, there is no logical reason why this type of legislation would not begin to arise in all areas of antitrust enforcement, regardless of the type of violation involved.

My point here is not that special interest legislation is inherently wrong, but that it should only be considered in very special circumstances, in which the rationale for exemption is absolutely unimpeachable. Such is clearly not the

case with respect to the bills now under consideration.

I appreciate having been afforded the opportunity to present these views to the Committee.

Mr. Nicholson. I am here at the request of the committee and not

on behalf of anyone involved in the industry.

I appreciate the opportunity to appear before you to comment on the proposed legislation which is the subject of these hearings. Essentially, these proposed bills would establish an exemption from the antitrust laws for certain exclusive territorial arrangements involving

trademarked food products.

And I think that this is an important concept to have in mind, that this legislation creates an exemption. That means it, as I interpret the legislation, would establish per se legality as distinguished from both per se illegality, which the Federal Trade Commission is asserting in its proceeding, and the application of a rule of reason, requiring examination of the kinds of facts, circumstances, and economic evidence that have been submitted to these hearings.

Before explaining my position on the propriety of the legislation, I think it would be helpful to summarize the context in which these

hearings take place.

On July 15, 1971, which was after the time I left the Commission, it issued a series of complaints against the major soft drink manufacturers. Now, Mr. Clements referred to, I think in the last few moments in response to your question, Senator Gurney, the 58 smaller franchised kinds of operations similar to his. In fact, the FTC proceeding involves eight companies: Coca-Cola, Pepsi-Cola, Seven-Up, Royal Crown Cola, Crush, Cott, Dr Pepper, and Canada Dry.

These complaints allege that the exclusive territorial restrictions governing the operations of the franchised soft drink bottlers are un-

lawful under section 5 of the Federal Trade Commission Act.

The complaint alleges both per se illegality and illegality under the rule of reason, which requires an economic inquiry to determine whether the restrictions are unreasonable in light of the peculiarities of the soft drink market.

Now, I think this situation with respect to the bottlers and the soft drink franchisors should be distinguished from the situation pre-

sented by Topco. The NIFDA people that testified today were concerned primarily with whether people engaged in distribution at the same horizontal level can come together and agree to allocate territories. That is not the same problem that is presented with respect to the allocation of territories by a soft drink company among those people engaged in distribution.

The former situation, NIFDA, which is a horizontal market division, has been held by the Supreme Court in March of this year in

the Topco case, to be illegal, with one judge dissenting.

The question presented by the NIFDA people is: Is this an unfair restriction upon our ability to compete with national marketers? I think that's an appropriate question for legislation because the Supreme Court has spoken on it.

In this connection, however, it is asserted—by the Federal Trade Conneision—that the Topco case and Schwinn establish the per se illegality of this kind of arrangement on a vertical sense, from the top down, among the people who are distributing.

I disagree with that. I do not think Schwinn holds, per se, that this

kind of arrangement is illegal.

In response to these complaints, the soft drink manufacturers contended, among other things, that the FTC proceedings were deficient in that they did not permit the joining of the bottlers.

I think that this has been answered by the Federal Trade Commission hearing examiner, who accorded them intervenor status. And I have with me the order of the hearing examiner, and the rights that are granted to the intervenors are, I think, in most respects, those that are accorded to parties, except that I believe these bottlers will not be bound by the decision, except as it affects those people who control them.

They have the right to object to questions proposed, right to crossexamine, right to offer evidence of their own, and the right to object and cross-examine is subject to the control of the hearing examiner.

As a collateral line of defense, however, certain of the soft drink manufacturers and franchised bottlers have launched a legislative program to preempt the FTC proceedings by establishing an antitrust exemption for the challenged territorial restrictions. This program has resulted in the five proposed bills now being considered.

On July 31, 1972, the staff of the FTC moved before the hearing examiner for a summary judgment of illegality based on the per se theory, which motion is currently pending before the hearing

An analysis of the most recently relevant Supreme Court precedents indicates that they may ultimately prevail if the interpretation of Schwinn by the FTC and by other courts is appropriate. I disagree with that interpretation.

I think it is unlikely that the FTC will approve a per se rule, and

I think there will not be a summary disposition of this matter.

With this background, I submit my opinion that the proposed legislation is not in the best interests of effective antitrust enforcement and is likely to do far more harm than good because it would operate to preclude a detailed legal and factual inquiry.

This view derives from the lack of showing of clear and convincing evidence that an exemption is warranted in that case, it being my conviction that such special interest legislation must be based on such

evidence.

The one inescapable conclusion that emerges from the extensive record of testimony thus far is that the competitive impact of these territorial restrictions cannot be properly assessed without first resolving a number of complex factual issues, a task which can only be accomplished through the adjudicatory process, one that the FTC

is particularly suited to do.

I would point out to the committee that the position of the manufacturers has some inconsistency. There is an article that appeared in the March 1970 issue of Soft Drinks Magazine, which is a magazine of the industry, written about a speech delivered before the California and Nevada Soft Drink Association convention in San Francisco, which was addressed by Mr. James D. W. Blyth, who at that time was president of Canada Dry, who at this time, I believe, is executive vice president of Norton-Simon, the parent company of Canada Dry.

I have extra copies of that article, if the committee would like to

have it.

Senator Gurney. We will accept it and put it in the record at this point.

(The document follows. Testimony resumes on p. 554.)

### "\* \* \* RADICAL ('HANGES ON FRANCHISE HORIZON"

In the most candid assessment of the future of soft drink franchising ever made in public by the head of a major franchise parent company, James D. W. Blyth, president of Canada Dry Corp., predicted that the next 10 years will see a

radical revision of the historic standard franchise agreement.

Speaking before last month's California-Nevada Soft Drink Association convention in San Francisco, Blyth said that current Congressional hearings into franchise activities will probably lead to new laws and regulations to protect franchisees. Although he felt the investigations are not aimed primarily at the soft drink industry structure, he foresaw a "rewriting" of franchise agreements in the soft drink field along the following lines:

Exclusive territories will disappear. "This will be tough to live with," Blyth said, "because it will increase competition in presently protected geographical

areas."

Absolute freedom for a bottler to take on any brand or combination of brands he wants.

Every franchise company will be represented with full lines in every part of

the business.

Eventual disappearance of cooperative advertising and promotional costs between parent and bottler. National brand advertising will be the responsibility of the parent, with local promotion to be handled largely by the bottler.

Pricing of extracts will have to be handled more realistically by parent com-

panies. "They should be priced competitively."

Franchising fee systems will have to be contracted "... based on sales, or

something to that effect," rather than being included in the extract price.

Bottlers will have a lot more freedom in dealing with parent companies and in turn, the parent will expect greater performance from bottlers according to contractual standards.

Blyth's talk, which centered around the convention theme of "The Age of Change" was titled "Moving Ahead of Change." In addition to his comments on the franchise system, he urged bottlers to move rapidly to update production and management techniques and proposed a co-operative attack on discriminatory litter laws and public agitation.

### "BEND WITH BAMBOO"

"In the past, the innovations that took place within a business were often the result of major industrial policies or individual executive direction. The trend now, however, frequently comes from outside the company. Industry is being

forced to bend, to take direction it might not normally take because of outside pressures," he commented.

Consumerism has become an "active and potent force" in American business life and is causing government to move into areas which have always been con-

sidered the "sacred province of free enterprise."

In addition, he said, the laws of economics—of production, marketing, sales and distribution—of fierce and unrelenting competition, are forcing many businessmen to make moves they might have avoided or ignored in the past.

He urged bottlers to be ready to adapt to these changes and to move ahead—

"to be prepared for the unexpected as well as the inevitable."

#### RESTRICTIONS DISAPPEARING?

When the "pop sold itself" it was a heyday for the exclusive franchise. However as time progressed, competition got keener, private labels entered the picture and bottlers began adding different types of products, he recalled.

This started an eroding of franchise boundaries. Blyth said this would continue

and eventually they would be completely unknown.

"One of the reasons for this," he said, "is television. The tube respects no boundaries. It carries its message far and wide . . . we are seeing an overlapping

of marketing interests on the part of many bottlers.

"Those who refuse to accept the laws of change, who are striving to maintain these areas of control, are finding themselves arguing over responsibility for market share who pays the most for the largest area covered by television, promotion, etc."

He pointed out that there are cities and marketing areas where seven or eight franchised bottlers of one brand are actually duplicating their production and selling efforts, "confusing customers with varied packaging and pricing, and

frustrating advertising agencies as well as franchise headquarters.

Warehouse delivery is another concept breaking down the franchise barriers. "... the practice displeases many bottlers but it is fast becoming the rule. Distributionwise, it makes more sense to store owners and managers to get their

shipments from one source and deal with one salesman."

The sale of company-owned plants to individual bottlers is also contributing to the gradual erasure of strict franchise boundaries. "What holds for Canada Dry holds for the entire soft drink industry and, it can safely be said, plant ownership by parent companies is a dying concept." Local ownership reacting to local market needs are essential to the success of any soft drink operation.

"... the laws of economics decree that this is a course the industry must take

if it is to survive.

These same laws, Blyth stressed, are dictating the centralized production concept. "Today's economics are all against the smaller bottler, as far as production goes. Packaging is becoming more and more a tool in the market place. To take advantage of this, the investment in machinery required is generally far beyond the ability of the small operator.

"With all of the complications presented by advances in packaging and one-way containers, and the high cost of machinery. I see no reason why the average bottler should not be delighted to get out from under the production

burdens and concentrate on distribution and marketing.

"Consolidation and cooperation is one solution he sees, Small bottlers may have to band together to amalgamate into a large territory with the franchise holders cooperating in overall ownership."

### LITTER PROBLEM

Pointing to the recently-proposed (by Senator Gaylord Nelson) Constitutional amendment banning non-returnables, he said:

"All of us are aware that litter is a people problem and the only valid solution lies in extensive public education programs in every sector of the country.

"If we are to meet this challenge we must all cooperate and join hands in bonds of mutual interest. Old methods and attitudes are being scrutinized and re-studied and some of the conclusions which are being reached may not always be the best for all of the parties concerned, but the changes are underway and we must prepare for them."

Mr Nicholson, I would like to give you, if I could, just a few examples of the kinds of conflicts and differences of opinion that appear to exist, based upon the testimony that has been heard by this committee.

I do this without any attempt to evaluate the evidence, or to deter-

mine its relative merit.

First of all, I think that all parties here, including Mr. Clements who testified this morning, agree, or appear to agree, that concentration in the bottling industry is increasing. However, proponents of this legislation contend that the rate of concentration will be increased by the removal of territorial restrictions, arguing that the larger bottlers will rapidly take over the territories of the smaller bottlers.

On the other hand, the FTC and some of the bottlers contend that removal of restrictions will have the effect of decreasing concentration by freeing the smaller bottlers, who have limited territories, to invade

the larger territories of others.

Both points of view appear to be supported by persuasive evidence, and the truth obviously lies somewhere in between. While some of the smaller bottlers will likely be absorbed by the more powerful bottlers, and that has been occurring, as Mr. Clements pointed out, with something over a 50 percent decrease in bottlers in recent years according to the figures introduced by the Federal Trade Commission, even though the territorial restrictions have existed. But the smaller bottlers, freed from territorial restrictions, should be able to grow and prosper at the expense of their larger, and perhaps less efficient, and less service oriented neighbors.

However, the overall long term net effect on competitive conditions in the soft drink industry, which includes a variety of business entities—and I think that's important because, in addition to the people who have testified, there are bottlers, there are canners—bottle manufacturers I am talking about—can manufacturers, and others who are involved directly in this industry. It's also far from clear at this early

juncture what the ultimate impact will be on the consumer.

Second, the FTC argues that removal of the territorial restrictions, thereby introducing intrabrand competition, will logically result in lower prices. Further, the FTC contends that wider use of central warehousing, with its efficiencies of size, will contribute to lower prices.

In support of the need for lower prices, the FT('points out the price differentials that presently exist in some trade areas and the rapidity

with which prices have risen in recent years.

Proponents of this legislation, on the other hand, contend that soft drink prices are already at very low levels and have been for some time.

They contend, further, that increased concentration and wider use of central warehousing-food chain distribution channels will

result in higher overall prices.

Third, the proponents of the legislation contend that expanded use of central warehousing will result in the elimination of returnable containers, which apparently retail at about 30 percent less

than the one-trip containers.

From this, they conclude that successful FTC action will result in adverse ecological consequences and rapid price increases. On the other hand, those seeking to remove the territorial restrictions argue that public demand for returnable containers can compel their use and point out that at least one major food chain uses returnable containers even for its private-label brands.

In any event, they contend that advanced recycling techniques would

mitigate any ecological impact.

It appears that those seeking to remove territorial restrictions could also argue that such action would promote the use of returnable containers. With a 30 percent price differential, it would seem that a small, local bottler could compete quite effectively with an invading larger bottler through the heavy use of returnable containers, which can be handled by the small bottler, but cannot, Senator, by the large bottler.

Senator Gurney. Thank you.

I think we will have to recess at this point. There is another vote in the Senate. Since it is getting on, I think we better reconvene at 2:30, and have lunch in the meantime.

The subcommittee will recess until 2:30.

(Whereupon, a recess was taken at 1:20 p.m., to reconvene at 2:30 p.m., the same day.)

## AFTERNOON SESSION

Senator Gurney. The subcommittee will come to order.

We will proceed with the testimony of Mr. Nicholson.

Mr. Nicholson. The fourth point, Mr. Chairman is that proponents of this legislation argue that increased use of central warehousing will result in the loss of many small accounts—for example, the corner grocery store—thereby reducing the overall volume of soft drinks sold and narrowing the number of outlets available to the consumer.

As Mr. Clements pointed out, the number of outlets and the availability of soft drinks in the cold bottle in the filling station and elsewhere, is important for testing, for advertising, and for studying

the opportunity of introducing a product such as theirs.

However, the soft drink manufacturers might well offset any such possibility by assigning areas of primary responsibility to its licensees and insisting that they provide adequate sales coverage and services within those territories.

Now, this is a procedure that the Federal Trade Commission, in a proceeding involving Snap-On Tools in 1961, in holding that certain territorial restraints were illegal, pointed out that assigning areas of primary responsibility was an alternative that did not violate the antitrust laws.

That means that a particular distributor would be assigned a primary responsibility with an area. If he did that, and did it properly, and did a thorough job, then he could go on and branch out into surrounding areas. But he could have his franchise terminated if he

did not do a good job in his area of primary responsibility.

Fifth point: Proponents of the legislation characterize the soft drink bottling industry as a localized, small business operation. However, while it is true that the industry includes a large number of small businesses, it also includes some relative giants, including a number of major conglomerates who have entered the field through acquisition. Obviously, much more than the preservation of small business is involved here.

In this connection, it should be noted that competitive practices valid at one point in an industry's development may be invalid at a later stage. Proponents of the legislation have emphasized the point that exclusive territories have in the past provided incentive for independent investors to take the risk of establishing bottling facilities.

This could well continue, Senator, in a situation such as Dr Pepper, as contrasted with Coca-Cola. Coca-Cola and the other majors are in every market. Dr Pepper is not in every market. Under an application of the rule of reason, it could well turn out in the FTC proceeding, that the FTC would permit Dr. Pepper to continue territorial restrictions while not permitting Coca-Cola to do that.

In the early stages of territorial development of soft drinks, such retrictions may have been a reasonable assist necessary to enable soft

drinks to break into the overall beverage market.

However, the soft drink industry is now a major, thriving sector of the food industry, with products distributed in every corner of the United States and annual revenues of approximately \$5 billion at wholesale. At this point, the protective mantle of territorial restrictions may not be supportable for the same reasons, although it may be supportable with respect to some of the smaller companies, or the new companies entering the field.

The parties involved in the FTC litigation have, by now, generated a great deal of economic and statistical data, much of which may be highly relevant in resolving important factual issues such as those

that just listed.

Some of this data has been cited in support of some of the many factual assertions which have been made during the course of these hearings. However, none of that material has yet been subjected to the rigors of the adversary process, where cross-examination—as well as direct testimony from chainstores, wholesalers, small grocery outlets, and others—is likely to reveal any number of errors, inconsistencies, or half truths, or to emphasize the truth and the veracity of the statements made. The same is true with respect to the oral opinions of industry and expert witnesses.

Apart from the above difficulties, these hearings are ill-suited as a vehicle for the resolution of the complex legal and factual issues involved because the focus here has been limited to the impact on the

bottling industry.

Yet it is the soft drink manufacturers, themselves, who are the respondents in the FTC proceedings, with the bottlers appearing only

as intervenors.

This may well be appropriate, since it is the manufacturers who are in a position to control the distribution of trademark licenses, the allocation of territories, and the policing of any territorial restrictions.

In order to properly dispose of the issues raised by the FTC complaints, the role of these manufacturers in the distribution system must be thoroughly examined and the extensive relevant material contained in their files, which has been, or will be, obtained by the FTC through the discovery process, must be subjected to judicial analysis.

It appears that the manufacturers intend to defend vigorously the FTC action; it is through this process of litigation that the legality of the territorial restrictions should be determined, and not through

legislative fiat creating a per se legality.

As noted above, the FTC staff has moved for summary disposition on the per se theory, and there appears to be some chance, in light of recent Supreme Court precedents, that the staff might eventually obtain a per

se determination of illegality.

However, I do not believe that any such ruling is likely to be obtained by way of summary procedures. The factual distinctions between this case an the applicable precedents are sufficiently weighty that the FTC, even if it were inclined to rule on a per se basis, would almost certainly insist that a record be developed on which a rule of reason determination could be made, even in the event a per se rationale were accepted eventually.

On the other hand, enactment of the proposed legislation would automatically preclude any judicial inquiry, per se or otherwise, into the legality of these restrictions. This would clearly be contrary to the public interest in a situation such as this, in which there are many factual and legal issues that have not been resolved, as well as some that

have not even been explored.

Further, enactment of this kind of legislation could severely and unnecessarily disrupt the entire mechanism for the development of antitrust policy. Frustrated by legislative preemption in this important case, the Government will almost certainly bring a similar case within a short period of time, and a new set of respondents, seeking to take advantage of this clear precedent, will initiate a barrage of special interest legislation.

Beyond that, there is no logical reason why this type of legislation would not begin to arise in all areas of antitrust enforcement, regard-

less of the types of violation involved.

My point here is not that special interest legislation is inherently wrong, but that it should be considered in very special circumstances, in which the rationale for exemption is absolutely unimpeachable, which is clearly not the case with respect to the bills now under consideration.

I should like to read into the record, just briefly, the difference between per so violations and the rule of reason because I think it illus-

trates, Senator Gurney, the seriousness of the problem.

In the *Topco* case, Mr. Justice Marshall, who spoke for the court, expressed the following view with respect to the application of the rule of reason, which is also based on the opinion of Justice Brandeis back in the Chicago Board of Trade case in 1918. It is that an analysis of the reasonableness of particular restraints includes the consideration of the facts peculiar to the business in which the restraint is being applied, the nature of the restraint, and its effects, and the history of the restraint, and the reasons for its adoption.

If this legislation is adopted, that kind of rule-of-reason inquiry would be precluded. Legislation permitting, or requiring the application of the rule of reason would forego the application of the per se

doctrine

The per se doctrine was articulated by Mr. Justice Black in the Northern Pacific case in which he said that there are certain agreements or practices which, because of their pernicious effects on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and, therefore, illegal without elaborate inquiry as to the precise harm they have caused, or the business excuse for their use.

I suggest to you that that kind of rule, the per se rule, should not be applied to the position of these bottlers and the manufacturers.

I suggest to you, however, that the application of the rule of reason with an extensive inquiry is warranted, and should not be precluded by this proposed legislation.

I appreciate the opportunity to appear at this hearing.

Senator Gurney. Thank you, Mr. Nicholson.

Mr. Bangert!

Mr. Bangert. Yes, sir; Mr. Chairman. There are just, I believe, a

couple of areas I would like to cover with you, Mr. Nicholson.

Let's go to this last point that you make. The witnesses that have testified as proponents of the proposed legislation have, through their testimony, indicated that what they would like is a rule of reason bill, a rule of reason approach.

I take it, you are cautioning us that what this bill would give is

something far more than a rule of reason approach?

Mr. Nicholson. Exactly. I think that this bill would preclude the kind of inquiry necessary to determine whether, in fact, the activity or the program operates in an anticompetitive fashion regardless of the kind of business reasons that have been explained here.

I was impressed by Mr. Clements' testimony. I was further impressed by his statement, which I read through this morning. These are very cogent and significant points, many of which I agree with, but I suggest to you that that kind of fact ought to be determined in an adjudi-

cative proceeding.

Mr. BANGERT. And as I understand, this bill, as long as you would have a situation where there would be two or more distributors in a territory, and where there was a trademark guidance, that factor alone would preclude the Government agencies from inquiry as to whether or not there were actual anticompetitive results?

Mr. Nicholson. Would you restate the question!

Mr. Bangert. As I understand the bill, if you had a situation wherein a territory there were two or more soft drink manufacturers represented——

Mr. Nicholson. Of the same product?

Mr. Bangerr. No. For instance, if there was a Pepsi-Cola distributor and a Coca-Cola distributor in an area, and if there was a trademark item involved which, of course, there would be, that under the bill before the subcommittee, that in and of itself would preclude the Government from making inquiry into the economic facts of the situation to determine whether or not there was anticompetitive results obtained by that kind of a relationship?

Mr. Nicholson. You are speaking of one distributor handling more

than one brand!

Mr. Bangert. No. I am speaking about two distributors, who com-

pete against each other.

Mr. Nicholson. The fact that they are in that territory on an exclusive basis would preclude the FTC or Department of Justice from inquiring into their operating into that territory exclusively, and if someone else came in and tried to invade that market and was terminated by the manufacturer, the FTC, and the Department of Justice could not challenge that termination because he violated his territorial restraints.

Senator Gurney. I am going to have to recess the subcommittee again for another witness. Excuse me.

(Whereupon, a short recess was taken.)

Senator Gurney. The subcommittee will be in order.

You have been very patient, Mr. Nicholson, and I hope we can make it this time.

Mr. Nicholson. No problem.

Mr. Bangert. The last area I would like to cover with you, Mr. Nicholson, is again the area of *Schwinn*. I take it that your feeling is—and I realize there have been a lot of bar association meetings and discussions and talk about what *Schwinn* is—but your feeling is. even in *Schwinn*, that there were the economic facts proved in that case, that would make that a rule of reason case?

Mr. Nicholson. That's correct, although it has been cited by the Federal Trade Commission in its brief seeking summary judgment on the per se theory, as authority governing this case, and it has been cited by a couple of other courts as authority for being a per se

violation on the vertical restraints, territorial restraints.

I disagree with that view, and would cite the language of the court where it says, "The Government has abandoned the per se theory. We are not examining this from per se theory." And proceeds to examine many things. I will say that Mr. Justice Fortas did not write an opinion with the degree of clarity that most lawyers would have appreciated in the area.

But I think the case clearly is not authority for the view that territorial restrictions of the kind here are per se violations of the anti-

trust laws.

Mr. Bangert. Lastly, I assume you are probably not in complete agreement with what the Federal Trade Commission was doing, going

on a per se theory strictly?

Mr. Nicholson. I would disagree with that. I think it would be wrong. It would not serve the purpose for which the Commission was created; that is, to make these broad factual inquiries. Congress, in its wisdom, in 1914, created the Federal Trade Commission by the passage of the Federal Trade Commission Act, because at the time the courts were too burdened, too inexperienced to make these kinds of inquiries.

I think this is a matter that is particularly suited for the examina-

tion of the Commission.

Mr. Bangert. Thank you. Senator Gurney. Mr. Chumbris?

Mr. Chumbris. Thank you. At this point I thought it would be helpful for the record if we insert a letter that was addressed to this subcommittee by Mr. Kintner, who was former chairman of the Federal Trade Commission, and former general counsel, exactly on the point whether it was a per se or rule of reason impact in the proposed bill, and place it in this point of the record, and also reserve at this point in the record, comments that the Federal Trade Commission, itself, and the Antitrust Division may submit as an appendix to their previous statement before this subcommittee, and let the subcommittee study the views of the respective experts on this particular point. And then the subcommittee can make its own judgment, rather than debate the issue with the witness.

Senator Gurney. The statement will be included, and the record kept open for the other views.

(The documents follow. Testimony resumes on p. 569.)

Arent, Fox, Kintner, Plotkin & Kajin, Washington, D.C., September 7, 1972.

Hon, PHILIP A. HART.

Chairman, Subcommittee on Antitrust and Monopoly Legislation, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: At the conclusion of the first portion of the hearings on S. 3133 and similar bills, you were kind enough to indicate that we would be permitted to make an additional submission for the record on behalf of the National Soft Drink Association, and I would like to take the opportunity to state our views with respect to a point raised during the hearings with regard to which I believe here has been considerable misapprehension. Several times during the hearings the suggestion was made that the effect of these bills would be to establish the per se legality of vertical territorial arrangements in the soft drink industry. I believe this to be an erroneous assumption and would like to address myself to the matter in some detail. In so doing, I plan to give collateral consideration to the record developed in the 1966 hearings before your Subcommittee which were concerned with legislation which would have been applied to territorial limitations imposed on distributors in general.

Rather than to establish a rule of *per se* liability, the purpose of the proposed legislation is to make clear to the antitrust enforcement agencies of the Federal Government that the Congress intends those agencies to consider the existence of vigorous interbrand competition before passing upon the legality of vertically imposed territorial restrictions where trademark licensing is involved. Such legislation is necessary because of the fact that, during the past two decades, Government agencies have increasingly taken the position that, regardless of the benefits to the consumer, the existence of such competition is immaterial.<sup>2</sup>

The language of the proposed legislation is simple and straightforward. In substance it provides that nothing contained in the Federal Trade Commission Act or in any of the antitrust acts shall render illegal a trademark licensing arrangement containing a territorial restriction on the licensee *provided* all of

the following conditions are met:

(1) The licensee is engaged in the manufacture as well as the distribution and sale of a trademarked food product.

(2) The product in question is in free and open competition with products of the same general class manufactured, distributed, and sold by others.

(3) The licensee is in free and open competition with sellers of other products of the same general class, and

(4) The licensor retains control over the nature and quality of the licensed products.

It is important to note that the proposed legislation is permissive in nature; it does not mandate the use of vertical territorial restrictions in trademark licensing arrangements, but rather makes clear that if a trademark licensor wishes to incorporate such provisions, he is permitted to do so—provided the requisite "free and open competition" with other products and with other sellers exists. In this regard, the factual question facing the Federal antitrust enforcement agencies would be the traditional inquiry, namely, whether the use of territorial restrictions in the particular circumstances constitutes an unlawful restraint of trade. If free and open competition were found not to exist in a particular market, the proposed legislation would not apply. Moreover, the existence of such competition must be established by a consideration of the factual record as a whole. Given these criteria, it is difficult to see how the proposed legislation could be characterized as conveying an antitrust exemption or making territorial restrictions "per se legal."

In the 1966 Hearings and the hearings held to date on the proposed legislation, concern has been expressed that the proposed legislation would bar the automatic use by Government agencies, in reviewing certain vertical territorial restrictions, of either a rule of per se illegality or a rule of presumptive illegality. In essence,

<sup>1</sup> Hearings on S. 2549 Before The Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary. Distribution Problems Affecting Small Business. 89th Congress, Second Session. Part 3 (Committee Print 1966) (Hereinafter cited as "1966 Hearings"). 2 See: White Motor Company v. United States, 372 U.S. 253 (1963): United States v. Arnold, Schwing & Company, 388 U.S. 365 (1967): Sandura Company v. FTC, 339 F. 2d 847 (6th Cir. 1964); and Snap-On Tools Corp. v. FTC, 321 F. 2d 825 (7th Cir. 1963).

then, the concern of the enforcement agenices appears to be with the shifting of the burden of proof, in reviewing the use of vertical territorial restrictions, from the party whose practices are challenged to the enforcement agencies themselves. But since the burden of going forward in antitrust enforcement has traditionally (and statutorily) been that of the prosecuting agency, the proposed legislation would leave the Government in its traditional posture and insure the challenged

party a consideration on the merits. It should be noted that the proposed legislation, if enacted, would not alter the existing law as it applies to territorial restrictions in situations in which free and open competition with other products and other sellers does not exist. Thus, from a procedural standpoint, in any case filed subsequent to the enactment of the proposed legislation, the enforcing agency would charge the defendant with unlawfully restraining competition through the imposition of vertical territorial restrictions. At this point, in order to take advantage of the limited protection provided by the proposed legislation, the defendant would have the burden of making a prima facie showing of the existence of "free and open competition" with other products and other sellers, and his failure to come forward with this evidence would, to the extent that vertical territorial restrictions may presently be considered per se unlawful (as argued by the Government), entitle the Government to summary judgment. We thus view the proposed legislation as imposing the substantial burden upon the defendant of establishing a prima facie showing that he has met the requirements of the legislation in order to take advantage of its limited protection. Once the defendant has satisfied this initial burden, it is entirely appropriate to expect the enforcement agency to develop the economic facts necessary to prove the existence of an antitrust violation, especially in view of the fact that the Government agency is clearly in the best position to obtain and analyze the detailed evidence of market data and has a responsibility to perform such analysis in order to initially determine whether the filing of an action is in the public interest. In addition to the practical and legal difficulties which would face a defendant's own attempt to secure such detailed information from his competitors, placing this burden upon the hapless defendant would confront a manufacturer-licensee who has already made a prima facie showing that free and open competition exists in the market, with the unacceptable choice between accepting a consent decree dictated by the enforcement agency (which has happened in a number of instances) or bearing the onerous costs for research and development of a full economic analysis in order to vindicate its practices.3

Given the substantial burden imposed upon a challenged manufacturer-licensee under the proposed legislation -namely, the prima facic showing of the existence of "free and open competition" with other products and other rellers in his market area-it is our view that the proposed legislation could not in any way be construed as conveying the status of "per se legality" on the use of vertical territorial restrictions in the trademark licensing context. A challenged party who does not choose to go forward and meet this burden would derive no benefit from the new legislation; he would be judged by precisely the same standards and the same tests under the new legislation as he is under existing law. And even for a challenged party who does go forward and meet the burden of the prima facie showing of the requisite degree of competition from others, unles the full showing on the merits validates the existence of "free and open competition" with other products and other sellers in his relevant market, the proposed legislation still effects no changes from present law. The ultimate effect of the proposed legislation, therefore, would be only to provide that where all of the necessary prerequisites contained in the legislation are met, namely the manufacture, distribution and sale of a trademarked product in a setting where vigorous competition exists, the use of limited vertical territorial restrictions in trademark licensing arrangements would not be unlawful under the antitrust laws.

In summary, this is not a proposed immunity statute, but rather a Congressional declaration as to the proof which would be required, and the burden thereof, in the case of trademark licensing arrangements involving the manufacture, distribution and sale of a trademarked product.

Very truly yours,

EARL W. KINTNER.

<sup>&</sup>lt;sup>2</sup> See, e.g., United States v. White Motor Company, 1964 Trade Cas. <sup>4</sup> 71.195 (N.D. Ohio 1964) (consent decree enjoining White from maintaining or enforcing territorial or customer restrictions, entered subsequent to the Supreme Court's reversal of the lower court's summary judgment for the Government); United States v. Witeo Chemical Corp., 1970 Trade Cas. <sup>4</sup> 72,993 (D. Pa. 1970); and United States v. Webster Electric Co., 1971 Trade Cas. <sup>5</sup> 73,566 (E.D. Wisc. 1971).

McKean, Whitehead & Wilson, Washington, D.C., October 12, 1972.

Hon, Philip A. Hart,

Chairman, Subcommittee on Antitrust and Monopoly Legislation, Old Senate Office Building, Washington, D.C.

Dear Senator Hart: Transmitted herewith is my statement in opposition to S. 3040, 3116, 3133, 3145 and 3587. For the reasons set forth in my statement, I consider these bills to be contrary to the public interest. I therefore respectfully urge that these proposed bills not be enacted.

Sincerely yours,

RUFUS E. WILSON.

PREPARED STATEMENT OF RUFUS E. WILSON OF MCKEAN, WHITEHEAD & WILSON, Washington, D.C., in Opposition to Enactment of S. 3040, 3116, 3133, 3145, AND 3587, BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY LEGISLATION OF THE SENATE COMMITTEE ON THE JUDICIARY

As a practicing antitrust attorney, and as a former Chief of the Division of General Trade Restraints of the Federal Trade Commission, I greatly appreciate this opportunity to submit my view concerning S. 3040, 3116, 3133, 3145 and 3587. These bills seek to amend the Federal Trade Commission Act to establish the per se legality of certain exclusive territorial arrangements involving trade marked food products. In essence, these bills would provide antitrust immunity for restrictive vertical territorial agreements.

In my opinion, this proposed legislation is contrary to the public interest and to the fundamental policy of the antitrust laws. These bills represent an effort on the part of major soft drink manufacturers and their franchise bottlers to establish a specific exemption from the antirust laws. This legislative effort must

be viewed in light of pending FTC proceedings. On July 15, 1971, the FTC issued a series of complaints against eight major soft drink manufacturers. The Commission challenged the exclusive territorial restrictions imposed by eight of the country's largest soft drink syrup manufacturers under Section 5 of the FTC Act. The five proposed bills represent the manufacturers' effort to preempt the FTC proceedings. Such special interest legislation is inimical to the public interest and to the studied articulation of antitrust policy.

The fundamental policy of the antitrust laws is the promotion of free, open and vigorous competition. The importance and significance of this policy to the national interest is incontestable. Consequently, any proposed exemption from the antitrust laws must convincingly demonstrate over-riding policy considerations which have a minimal detrimental effect on competition. Only in the adjudicative forum can all the relevant facts and data be properly and exhaustively elicited. The proposed legislation should not interrupt or preempt the pending

FTC adjudicative proceedings which will accomplish this very task.

It should be noted that the FTC staff has moved for summary disposition of these cases on a per se theory of illegality. In light of the Supreme Court's holdings in Schwinn, Topco, White Motor, and Sperry & Hutchinson Co., the challenged vertical territorial restrictions imposed by the soft drink manufacturers may very well fall pursuant to a per se approach. The Commission may, however, decide that the applicable precedents are sufficiently distinguishable to proceed with the proceedings pursuant to a rule of reason analysis. The critical point is that the passage of the proposed legislation will immediately establish per se legality of the territorial vertical restrictions in the soft drink industry, thereby eliminating either a per se or a rule of reason inquiry. The passage of this legislation would be harmful and frustrating to the adjudicative process and to the effective enforcement of the antitrust laws.

The proponents of the legislation uniformly contend that if the Commission successfully proves the challenged vertical restrictions to be unlawful, many licensees of trade marked products within the soft drink industry will be forced out of business. It is feared that the larger bottlers will rapidly take over the best accounts in the territories of the smaller bottlers and that the smaller bottlers will either be forced out of business or absorbed by the larger bottlers. This argument is offered as the principal justification for the complete elimination of

intra-brand competition.

It must be stressed that the Commission's proposed order more than adequately insulates small bottlers from any danger of imminent demise. The order proposes that small bottlers will be freed from their territorial restrictions and will be permitted to enlarge their market areas into the territories of the larger bottlers. However, for the period of ten years, the larger bottlers' territorial restrictions will be maintained. The effect of this order will be to prevent any onslaught of take evers of small bottlers who would initially be subject to that threat and would enable such small bottlers to expand either individually or through merger.

As previously mentioned, the proposed legislation provides for the elimination of intra-brand competition in the soft drink industry. The proponents argue that inter-brand competition will adequately benefit the consumer. The consumer should not, however, be deprived of the benefits of intra-brand competition. Such intra-brand competition would result in demonstrable price benefits to the consumer. The lack of intra-brand competition would result in price rigidity. Moreover, marketing programs have developed strong consumer preference for individual brands and it is highly doubtful that inter-brand competition would be vigorous if intra-brand competition is eliminated.

#### CONCLUSION

The proposed legislation represents an attempt by the major soft drink manufacturers and their franchise bottlers to exempt themselves from the antitrust laws. The arguments and contentions offered in favor of this exemption are less than convincing. Antitrust immunity is so critically significant to our national interest that it must meet a higher burden of persuasion.

#### PRESS RELEASE

Rufus E. Wilson, formerly Chief of the Division of General Trade Restraints, Bureau of Competition, Federal Trade Commission, and now a partner in the law firm of McKean, Whitehead & Wilson in Washington, D.C., today expressed his views on S. 3040, 3116, 3133, 3145 and 3587. These pending bills would allow exclusive territorial arrangements involving trade marked food products by amending Section 5(a) of the Federal Trade Commission Act.

Mr. Wilson stated that the bills are "... contrary to the public interest and to the fundamental policies of the antitrust laws." The current bills, according to Mr. Wilson, represent an effort on the part of the soft drink industry to establish an exemption from the antitrust laws by granting per se legality to certain exclusive territorial arrangements. Mr. Wilson stated that such "special interest legislation is inimical to the public interest" and that passage of such legislation would be "harmful to the adjudicative process and to the effective enforcement

of the antitrust laws."

Mr. Wilson notes that the Federal Trade Commission has challenged the exclusive territorial restrictions imposed by eight of the largest soft drink syrup manufacturers and that the Federal Trade Commission staff has moved for summary disposition under a per se theory of illegality. Mr. Wilson stated that in light of recent Supreme Court precedents the challenged vertical territorial restrictions may well be considered per se illegal. But he pointed out that the Commission may decide that the precedents are sufficiently distinguishable so as to proceed under a rule of reason. Mr. Wilson stressed that passage of the proposed legislation would immediately establish per se legality in the soft drink industry, among others, and thus eliminate any per se or rule of reason inquiries in the pending proceedings.

Mr. Wilson contends that, contrary to the arguments of the proponents of the legislation, the Commission's proposed order more than adequately insulates small bottlers from any danger of immediate demise. Small bottlers will be freed from territorial restrictions whereas larger bottlers will be restricted territorially for a period of ten years. This would allow the smaller bottlers to enlarge and expand and, in turn, prevent any onslaught of takeovers by larger bottlers, thus assuring intra-brand competition. The proposed legislation would have the opposite effect in that intra-brand competition would be eliminated, according to Mr. Wilson, who stressed that intra-brand competition would result in price benefits to the

consumer.

DEPARTMENT OF JUSTICE, Washington, D.C., September 25, 1972.

Hon. PHILIP A. HART, Chairman, Subcommittee on Antitrust and Monopoly, U.S. Senate, Washington, D.C.

Dear Senator Hart: This is in reply to your letter of August 17, 1972, requesting my opinion on an aspect of the proposed legislation on which I gave testimony before the Subcommittee on August 8, 1972 (S. 3040, S. 3116, S. 3113, S. 3145, and S. 3587). These bills are all quite similar in language, and would, in substance, permit, in the majority of instances, the owner of a trademark covering a food product to incorporate in its licensing agreements provisions designating a licensee to be the only manufacturer, distributor, and seller of the trademarked product located in a specific geographic area, and restricting such licensee to selling the product only within the geographic area assigned it by the licensor.

In your letter you indicated that although it was clear from the hearings that all participants seemed to agree that if these bills were enacted the territorial arrangements provided for in the proposed legislation would not be proscribed as per se illegal (assuming the prerequisite conditions prescribed in the bills were satisfied), there appeared to be some question as to whether or not it would be permissible for courts to follow a rule of reason approach, or whether such

arrangements would become per se lawful.

The Antitrust Division believes that the purpose of this proposed legislation, and what its effects would be if enacted, are unmistakably clear from the language of the bills themselves. The legislation proposed would amend Section 5(a) of the Federal Trade Commission Act [15 U.S.C. 45(a)] to provide expressly that, "Nothing contained [therein], or in any of the antitrust Acts. shall render unlawful the inclusion and enforcement" of licensing agreement provisions covering a food product granting the licensee or franchisee an exclusive territory or restricting a licensee or franchisee to selling the product only within a defined geographic area—if three prescribed conditions are satisfied. These conditions, as you noted in your letter, are (1) that the product subject to the territorial restraint is in free and open competition with products of the same general class and manufactured, distributed or sold by others, (2) that the licensee is in free and open competition with virtually all other products of the same class, and (3) that the licensor retains control over the nature and quality of such products in accordance with the provisions of the Trademark Act of 1946, as amended [15 U.S.C. 1051].

The requirement of "free and open competition" is apparently derived from the Miller-Tydings Act, superseded by the McGuire Act, [15 U.S.C. 1]. Federal law provides that only commodities which are in "free and open competition with commodities of the same general class produced or distributed by others" may be the subject of resale price maintenance according to the state "fair trade" laws. As we read the bills now before this Subcommittee, once the criterion of "free and open competition" along with the requirement of trademark maintenance is met, territorial restraints would receive immunity from the antitrust laws. As the cases interpreting the McGuire Act and parallel state statutes show, little is needed to establish the presence of "free and open competition." Thus, copyrighted books,1 patented commodities,3 and commodities which have only one other competitor in the market,3 have been held to be in "free and open competition." The California Supreme Court considered the term "fair and open competition"—which is often used by state law in lieu of "free and open competition"—to require only that there are on the market, commodities produced by others which are so similar in character that they provide competition not hampered by unlawful trade restraints. The California court rejected contentions that the required competitive conditions do not exist under market conditions permitting unreasonably high prices, price leadership, relative uniformity of prices, and high level mark-ups leading to exorbitant profits.4

Schill v. Remington Putnam Book Co., 17 A. 2d, 175 (Md. Ct. of App. 1941).
 Glenn Raven Knitting Mills, Inc. v. Sanson Hosiery Mills, Inc., 189 F. 2d, 845 (4th Cir. 1951).

<sup>3</sup> See Eastman Kodak Co., 44 FTC 14, 1947 (FTC Dkt. 4322).

<sup>4</sup> Scovill Mfg. Co. v. Skaggs Pay Less Drugstore, 291 P. 24 936 (Cal. Sup. Ct. 1955).

In our view then, the legislation if passed would establish antitrust immunity and *per se* legality in virtually every product falling within the general commodity description of the legislation. Except in markets in which one firm enjoyed a total monopoly (in which case there would be no need for any territorial restriction), this legislation would make territorial restraints *per se* legal.

This approach is contrary to and would eliminate long-standing rules governing economic conduct in this nation. Those rules require analysis of a particular practice in a particular industry in determining its desirability, reasonableness, economic justification, and necessary scope—unless the conduct is so pervasive and lacking in redeeming virtue as to eliminate any cause for such an inquiry.

Best regards. Sincerely,

Thomas E. Kauper. Assistant Attorney General, Antitrust Division.

Federal Trade Commission, Washington, D.C., October 20, 1972.

Hon. Philip A. Hart, Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Senator Hart: In accordance with your letter of August 17, 1972, I am submitting the following personal views on the question of what standard of lawfulness would be applied to territorial restrictions under S. 3133, and similar bills, which would permit territorial restrictions in food manufacturing under the following conditions:

"(1) [the] product is in free and open competition with products of the same

general class manufactured, distributed, and sold by others; and

(2) the licensee is in free and open competition with vendors of other products

of the same general class \* \* \*."

At the outset, I note that the key phrase, "free and open competition," has been construed elsewhere to mean that commodities are in "free and open competition" so long as an absolute monopoly does not exist for that commodity. Under traditional legal concepts, there is little likelihood of an absolute monopoly existing in individual markets in the food manufacturing industry. Thus, it seems clear that the free and open competition provisions of the proposed legislation were consciously designed at prevent the antitrust enforcement agencies from ever challenging territorial restrictions in this \$131 billion segment of the economy.

As you know, terms similar to the "free and open competition" phrases of the proposed legislation have been widely used in the so-called "fair trade acts." The McGuire Act requires that products subject to fair trade contracts be in "free and open competition with commodities of the same general class \* \* \*." 15 U.S.C. § 45(a)(2), and the Miller-Tydings Act has an identical provision.

Prior to the passage of the McGuire Act, there were no decisions holding that a company could not fair trade because its products were not in fair and open competition. In the 20 years the McGuire Act has been in effect, the only instance in which a company's product was found not to be in free and open competition with products of the same general class was an absolute monopoly situation where Eastman Kodak was the only manufacturer of color film. Eastman Kodak v. FTC, 158 F. 2d 592, 594 (2d Cir. 1946), cert. denied, 330 U.S. 828 (1947). The court held that "If a purchaser wants a color film he must be able to buy it from more than one manufacturer if there is to be 'free and open competition with commodities of the same general calss' \* \* \*." When another firm entered this industry, the order against Kodak was suspended for the period in which that firm's color film was "\* \* \* sold in free and open competition with respondent's Kodachrome film." Eastman Kodak Co., 44 F.T.C. 14, 16 (1947). Thus, the Eastman Kodak proceeding demonstrates that products may be considered to be in free and open competition unless the products are sold by a monopolist.

Similarly, it has been held that the mere fact that a majority of an industry's sales, Ronson Patents Corn. v. Sparklets Devices, Inc., 112 F. Supp. 676, 684-85 (E.D. Mo. 1953), affd), 202 F. 2d 87 (8th Cir. 1953), or even the fact that a firm has the "\*\* \* lion's share of the business does not indicate that one is not in fair and open competition." Eastman Kodak Co. v. Lec-Wilson, Inc., 138 F. Supp. 594, 594 (D. Mass. 1955). The only case which has suggested the contrary is Gillette Co. v. White Cross Discount Centers, Inc., 1962 CCH Trade

Cas. \$70.481 (Pa. C.P., Allegheny Co. 1962), which found that insufficient evidence had been introduced to show free and open competition when Gillette had 95% of double-edged razor blade sales and 70% of all blade sales. This case had no lasting precedential value as the next year another court trying the same issue concluded that Gillette's blades were in free and open competition, notwithstanding the large percentage of the market held by the company. The court based its conclusion upon the testimony of one Gillette official who asserted the existence of free and open competition with similar products, Gillette Co. v. Warner Stores Co., 1963 CCH Trade Cas. \$70,859 (Pa. C.P. No. 2 1963). Thus, even a firm with an overwhelming majority of an industry's sales has been held to have products which are in free and open competition.

Unique products also have been held to be in free and open competition. For instance, despite the uniqueness of performances of particular artists, longplaying phonograph records are in free and open competition, Columbia Records, Inc. v. Goody, 278 App. Div. 401, 105 N.Y.S. 2d 659 (1st Dept. 1951). The court there also noted that copyrighted books have been found to be in free and open competition, 105 N.Y.S. 2d at 664. Moreover, patented products have been held to be in free and open competition. Eastman Kodak Co. v. Siegel, 150 N.Y.S.

2d 99, 104, 105 (Sup. Ct. 1956).

Under this authority, a free and open competition clause would sanction all competitive conditions short of outright monopoly. Looking at the soft drink industry, it is clear that, regardless of market shares held by the various companies, no one company occupies an absolute monopoly position. With the existing precedents so heavily weighted in favor of a finding of free and open competition, the proposed legislation clearly does not set forth a "rule of reason" standard for adjudging the legality of territorial restrictions. What is intended, obviously, is a virtual rule of per se legality.

The proposed legislation, of course, would cover more than just the soft drink The four identical "soft drink" bills, S. 3133, 3040, 3145, and 3116, industry. apply to "any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture (including manufacture by sublicensee, agent, or subcontractor) distribution, and sale of a trademarked food prod-

uct \* \* \*."

This language can be easily read to include the entire \$131 billion food manufacturing industry, not just the \$5 billion soft drink industry. Even proponents of the proposed legislation admit that it might apply to "some bread operations." Testimony of Earl W. Kintner, August 9, 1972, Transcript at 271. This admission is not surprising in view of the recent consent judgment in which Arnold Bakers, Inc. agreed to cease imposing territorial restrictions on its bread licensees. United States v. Arnold Bakers, Inc., 1970 CCH Trade Cas. 573,188 (E.D. Pa. 1970). Arnold licensees operate in a manner similar to soft drink bottlers; they purchase dough from Arnold, manufacture bread products from it, and then sell the products under the Arnold trademarks. Other like examples could be given

of the widespread impact such legislation could have.

Apparently, the contention that the proposed legislation would be limited primarily to the soft drink industry is based on the erroneous premise that only actual food manfacturing licensees would be included under the proposed legislation. This interpretation ignores the actual language of the soft drink bills which cover all trademark licensing contracts in food manufacturing "in which the licensee engages in the manufacture (including manufacture by a sublicensee, agent or subcontractor) . . ." Thus, the proposed legislation does not require that the trademark licensee himself manufacture the licensed product but allows it to be manufactured by his agent. Presumably, this clause is to cover the many soft drink bottlers who purchase some or all of their soft drink products from other companies, including the syrup manufacturers, who are designated as "agents." However, this "agency" procedure could easily be used in other food manufacturing industries. For instance, manufacturers of canned fruits and vegetables could require their wholesalers to designate the manufacturers as the wholesalers' agents, which would bring them under the coverage of the proposed legislation.

The proposed legislation, then, would clearly cover the soft drink industry, certain bread companies and an unquantified number of other food manufacturers who operate in a manner similar to the soft drink companies. Moreover, the agency clause would make possible the utilization of territorial restrictions by

almost any trademark food manufacturer.

Note, too, that S. 3587, also under Committee consideration, applies to all manufacturers of trade-marked food products which "manufacture . . . or distribute" such food products. This bill would extend the antitrust exemption to cover the distribution of all manufactured trademarked food products, thus avoiding the formality of entering into agency agreements.

The intent of these bills, and their impact if passed, would be to insulate territorial restrictions from normal antitrust standards, to the principal benefit of a relatively small group of now prosperous companies, at great potential cost to consumers. Small businesses will not be saved. They will increasingly disappear.

Such legislation is clearly contrary to the public interest.

I appreciate the opportunity to present these additional views to the Subcommittee. The above comments are my personal views and do not constitute an official statement of the Federal Trade Commission, or any of its members. The Commission has neither reviewed nor endorsed this letter.

Sincerely,

ALAN S. WARD, Director, Bureau of Competition.

NICHOLSON & CARTER, Washington, D.C., October 18, 1972.

Hon. PHILIP A. HART, Chairman, Subcommittee on Antitrust and Monopoly Legislation, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Senator Hart: This is in response to your letter of September 15, 1972, requesting my opinion on an issue that has arisen in connection with the proposed legislation which was the subject of my testimony before the Subcommittee on September 14, 1972. Essentially, this proposed legislation (S. 3133 and four similar bills) would exempt from the antitrust laws vertical territorial restrictions involving trademarked food products.

In your letter you posed the question whether this legislation, if adopted. would allow the courts and the Federal Trade Commission to continue to apply a rule of reason analysis to such restrictions, or whether the effect of the legislation would be to confer the status of per se legality. You further suggested that this question might have arisen, at least in part, from semantic confusion

between the terms "rule of reason" and "per se."

In my judgment, far more is involved here than simply a question of semantics. The rule of reason, the "general rule of construction" in antitrust cases, requires interpreting the law "in the light of a broad public policy favoring competition and condemning monopoly," thereby enabling courts "to decide whether conduct is significantly and unreasonably anticompetitive in character or effect." 1 On the other hand, "[c]ertain forms of conduct . . . are 'conclusively presumed to be illegal, by reason of their nature or their necessary effect,' so that they can quickly and positively be adjudged violations. . . . In such cases, inquiry under the Rule of Reason is over" 2 and a rule of per se illegality is applied.

With these definitions in mind, it is my opinion that the proposed legislation would establish a rule of per se legality for territorial restrictions, thus precluding any inquiry under the rule of reason into their competitive effect. Under this legislation, so long as certain minimal conditions are present,3 any territorial restriction involving a trademarked food product would be "conclusively presumed" to be legal, without regard to whether the particular restriction "merely regulates and perhaps thereby promotes competition or whether it is

such as may suppress or even destroy competition."

Despite some disagreement in the antitrust bar about the precise meaning of the holding in United States v. Arnold Schwinn & Co., I believe that under

Attorney General. Antitrust Division. 4 388 U.S. 365 (1967).

Report of the Attorney General's National Committee to Study the Antitrust Laws, at 11 (1955). (Hereinafter referred to as "Atty, Gen. Rept.") Cf., the Supreme Court's opinion in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint ad its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

2 Atty, Gen. Rept. at 11.

3 That the conditions specified are, indeed, minimal—in fact, almost universal—is well demonstrated in the letter of September 25, 1972, from Hon. Thomas E. Kauper, Assistant Attorney General, Antitrust Division.

present law governing the types of restrictions involved here, the courts are required to apply the rule of reason. In the soft drink cases pending before the Federal Trade Commission, for example, this would include a careful evaluation of the various unresolved factual issues discussed in my testimony of September 14,5 as well as others. Under the proposed legislation, however, a food manufacturer could defeat any antitrust challenge by simply alleging and proving that the specified conditions exist. At that point, summary dismissal of the case would be mandated.

By substituting such a shorthand, per se rule of legality for the rule of reason, the proposed legislation would seriously weaken the well established principle that the law "must always be guided by the established facts in the particular case at issue." by which "requires the examination of market situations both of structure and behavior and the marshaling and analysis of evidence relevant thereto"  $^{7}$  in order to determine legality.

Respectfully submitted,

JAMES M. NICHOLSON.

Mr. Chumbris. Thank you very much. I have no further questions. 1 believe the witness has stated his position. Other experts have given

their views, some in variance.

There is some agreement between Mr. Nicholson's point of view and the various experts of the Department of Justice, and the Federal Trade Commission. We will let the record speak for itself.

Senator Gurney. Thank you, Mr. Nicholson, we apppreciate your taking your time to come up here and giving us the benefit of your

knowledge and experience.

Mr. Nicholson. Thank you, Mr. Chairman.

Senator Gurney. The next witness is Mr. Russell Hopkins. Would you identify yourself for the record, Mr. Hopkins?

## STATEMENT OF RUSSELL G. HOPKINS, EXECUTIVE MANAGER, THE NATIONAL BEER WHOLESALERS' ASSOCIATION OF AMERICA, INC.

Mr. Hopkins. Yes. My name is Russell G. Hopkins. I am executive manager, National Beer Wholesalers' Association, and I would like to submit a statement for the record, Mr. Chairman, and then briefly summarize this statement in my remarks today.

Senator Gurner. Your statement will be included in the record.

(The document follows. Testimony resume on p. 572.)

STATEMENT BY RUSSELL G. HOPKINS, EXECUTIVE MANAGER, THE NATIONAL BEER WHOLESALERS ASSOCIATION OF AMERICA, INC., BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE COMMITTEE ON THE JUDICIARY OF THE U.S. SENATE, SEPTEMBER 14, 1972

The National Beer Wholesalers' Association of America, Incorporated, representing over 2,000 independent beer distributors throughout the United States, welcomes this opportunity to testify in regard to Senate Bills S. 3040, S. 3116, S. 3133, S. 3145 and S. 3587, proposing to amend the federal antitrust laws in regard to exclusive territorial arrangements between suppliers and their customers.

Since we submitted a statement for the record in connection with the hearings conducted by this Subcommittee during the August 8 through 10, 1972 period, relating to the so-called soft drink bills, we intend today to devote our comments to the more general issue of exclusive territorial arrangements as covered by

<sup>&</sup>lt;sup>5</sup> E.g.: If the restrictions are removed, what will be the net effect on industry concentration and price levels? Will returnable containers be eliminated and, if so, how will that affect competitive conditions? What will happen to corner gracery stores and other small outlets? Are territorial restrictions valid for some connections, such as those seeking to enter new regional markets, and not for others? Could the industry function just as well using areas of primary responsibility, rather than protected territories?

<sup>6</sup> Atty. Gen. Rept. at 340.

<sup>7</sup> Id. at 339.

Senator Percy's proposed measure, S. 3587, which would permit exclusive territorial agreement between suppliers and distributors throughout the trademarked

food industry.

The most notable feature of the first round of hearings conducted by your Sub-Committee, in our opinion, was the extraordinary concern expressed by spokesmen of the Federal Trade Commission for the welfare of the small businessmen as well as an indication that the agency desires to maintain a balance of industry forces, so that long-run competition will be enhanced.

Indeed, Lawrence G. Meyer, the FTC's Director of Policy Planning, addressing the Georgia Beer Wholesalers' Association on August 18, 1972, revealed an even more sympathetic stance on behalf of the small business community, by stating certain types of centralized buying "pose a great threat to the continued viability of small wholesalers which raises a substantial question concerning the ability of our nation's smaller bottlers, wholesalers or other businessmen to survive."

Mr. Meyer noted that the FTC staff, in commenting on the pending legislation, has stressed the benefits to the consumer through lower prices from central warehousing, and declared that "I am not willing to pay the price in the terms of the possible demise of small business, that a continued growth in central

warehousing might precipitate.'

Thus, it would appear that the goals of the Federal Trade Commission and those supporting the exclusive territory concept are quite similar if not identical. Apparently, the dispute in this instance centers around differing evaluations of the impact that exclusive territories have upon competition, and what might be

expected if such arrangements be abolished.

Hopefully, our testimony at this hearing as focused on the competitive impact of exclusive territorial arrangements in the brewing industry will be of value to the Federal Trade Commission and to this Subcommittee in determining whether virtually all such marketing devices should be condemned or whether they should be wholly or partially accepted in the interest of preserving a balance of competitive industry forces and long-term competition.

Perhaps one of the most vital aspects of the territorial issue that was not clearly brought out at the initial hearings by this Subcommittee, is the distinction between unilateral restrictions imposed upon a distributor by a supplier, limiting his freedom to serve a territory or customers; and bilateral territorial provisions sought by the distributor in order to provide him with protection against

unfair acts of other parties, or by the supplier itself.

The National Beer Wholesalers' Association stands vehemently opposed to any legislation such as S. 3040, S. 3116, S. 3133 and S. 3587, which would permit a supplier to arbitrarily chop down a wholesaler's territory or rob him of his most lucrative customers—a practice which has been aptly described as "terminating with-out really terminating."

Likewise, we consider a contractual provision restricting a wholesaler's territory, while reserving the right to appoint another distributor to sell in the same market; or permitting the supplier itself to compete against its own distributor.

to be unconscionable.

We believe that the Supreme Court had such restrictions in mind when it handed down the Schwinn decision in 1967. We find it difficult to accept the proposition that the Supreme Court or Federal Trade Commission intended to strike down territorial arrangements which tend to strengthen the franchisee's ability to perform as an independent business enterprise, while simultaneously enabling him to resist coercive pressures exerted upon him by giant corporations who would otherwise be free to manipulate him at will.

We also stand opposed to the legislation being considered here, in its present form, since it fails to incorporate fundamental safeguards necessary for the con-

tinued survival of independent franchisees.

The legislative measures before the Sub-committee actually would weaken the legal ability of distributors by permitting their suppliers to maintain practical dominance over their marketing partners through the imposition of restrictions upon the customers to whom they sell and the geographic markets in which they operate.

It is meaningless to protect a small businessman's sales and presumably his profits by assigning a territory if no corresponding protection is afforded to assure him security in the equity, continuing investment and going-concern value

of his business.

Should Congress permit business to enter into arrangements which mutually limit the markets in which they may operate in order to protect small businessmen from being driven out of business, then this objective can only be assured of success if Congress also limits the ability of suppliers to refuse to deal with a dealer or distributor in a manner which effectively destroys that small businessman's investment and the value of his business.

Suppliers must be prevented from carving our territories to the point where no small distributor is sufficiently profitable and self-reliant to resist suppliers' demands, which encroach upon the small businessman's exercise of independent

judgment on such matters as resale pricing.

Surely, it is ironic that some of the interests promoting the legislation we are now discussing should be seeking immunity from territorial restrictions in the

name of small, independent businessmen.

A number of these same soft drink industry factions found great fault and made strenuous objections to various forms of franchise protection legislation which came before this same committee in the late 1960's and which dealt with the need for protection against unjust terminations.

Although their Director of Policy and Planning disagrees significantly, the official Federal Trade Commission position is that breaking up exclusive territories would benefit smaller bottlers, wholesalers, and retailers, among others.

One must wonder how the FTC can presume to be better qualified to predict the outcome of their legal efforts than those who are on the firing line themselves and must ultimately pay the consequences of any Government instigated undertaking.

If exclusive territories are responsible for concentration in the brewing industry and are contrary to the interests of the small businessman, why did 95% of the beer wholesalers responding to a highly regarded survey by the Cambridge Center for Social Studies four years ago, state that they favored brewers designating only one wholesaler for a specific territory?

Why did the Advisory Board of the National Beer Wholesalers' Association adopt a resolution in 1972 favoring exclusive territorial legislation containing

adequate safeguards to protect the interests of franchisees?

A few quotes from NBWA members asked to predict the consequences of prohibiting exclusive territories, summarize eloquently the views of independent distributors on the subject.

(Wholesaler #1)... "business conditions would favor those companies with greater financial resources; the big would get bigger by selling the larger retail accounts and eventually the less financially secure wholesaler would be eaten alive.

"For a short period of time after the elimination of exclusiveness, prices would drop due to competition. However, as the less financially secure wholesalers were bought out by more powerful money men, prices would be raised, consistent with such industries as are generally monopolized.

"In the end, more concentrated control of brands of beer by wholesalers is not in the best interest of the consumer. Control of markets leads to price abuse, and

the consumer suffers,"

(Wholesaler #2): "I believe the exclusive territorial arrangement is almost

a necessity for a wholesaler to survive in this industry.

"If the large chains are ever allowed to have central warehousing and direct purchasing, it will practically eliminate the small retailer in all of our marketing areas. Where we now have 20,000 licensed retailers in Illinois, I can see this number drop drastically, meaning a loss of revenue and thousands of people out of work.

"If wholesalers of like brands begin competing against each other for these sales, I am sure we will put ourselves out of business; then the brewer will have

to sell direct, as we will all have given away our profits."

Clearly, while certain types of territorial restraints deserve to be eliminated, as we have observed, neither the courts, Congress, nor the enforcement agencies are doing the small business community a favor by outlawing equitable, exclusive arrangements which possess a sound economic basis and foster a healthy competitive structure.

It is encouraging that the Federal Trade Commission itself has recognized the small franchisee's need for some type of territorial protection by proposing, in connection with its territorial restriction cases applicable to the soft drink industry, that "large bottlers be prohibited from selling into territories of small oottlers, while small bottlers would be permitted to sell into the profitable terri-

tories now served exclusively by large bottlers."

While deferring to the soft drink industry to offer its comments on the merits of this proposal, our initial reaction is that application of such an approach in the brewing industry would not encourage the small distributors to compete against their larger brethern in their own backyards.

An alternative approach would be to prohibit large franchisees from invading the territories of smaller ones except in "self-defense", and only to recover busi-

ness in proportion to that lost to the invasion of smaller competitors.

Another underlying assumption set forth by those challenging exclusive terri-

tories is that they tend to eliminate competition.

However, the brewing industry, which is characterized by exclusive territorial arrangements (not to necessarily imply any agreement among the parties), has earned a reputation for being fiercely competitive. In 1961 there were 161 brewers. Today there are only 68 survivors, Chicago's last brewery closed its doors in August.

Let us not overlook the fact that granting an exclusive territory for the marketing of even a major brand of beer does not immunize the wholesaler from several forms of competition which compel him to maintain a reasonable price

structure.

A Budweiser distributor who raises his price significantly above that charged by Budweiser wholesalers in adjoining markets will lose sales because consumers buying in "border areas" will switch their purchases to retailers across "the border", in order to save money.

A Budweiser distributor who raises his price above "normal" will also face the prospect of losing some of his customers to the Schlitz distributor or another competitor who is providing a better value from the consumer's

standpoint.

Lastly, today's beer wholesaler is well aware that the higher the price of beer in his market, the greater will be the likelihood that consumers will favor substitute beverages such as wines, which are advancing at a far greater growth rate than beer.

In conclusion, we feel that exclusive territorial arrangements which contain safeguards designed to maintain the independence of the franchisee and provide him with a reasonable prospect for survival, are in the public interest.

It follows that suppliers and franchisees utilizing such marketing techniques should be considered innocent unless it can be demonstrated that they are guilty by reason of actions resulting in a substantial lessening of competition.

Unless Congress acts promptly, we fear that Federal action designed to

stimulate competition will have the opposite effect.

The issue raised with respect to exclusive territorial arrangements is not dissimilar to that associated with predatory pricing perpetrated by large companies which may result in lower prices and more competition in the short run, while ultimately raising prices and deterring competition.

It would be somewhat of a paradox if brewers injured by destruction of the exclusive territorial system to which they cling in order to remain competitive, turned out to be the same ones that the Federal government is attempting to

"protect" by anti-merger and anti-predatory pricing actions.

We recommend that the merit of the exclusive territorial concept be evaluated in terms of effects on brewers, bottlers, wholesalers, retailers and consumers as a whole, rather than on the negligible financial detriment it may have on a few of the corporate chains which undoubtedly will survive and prosper, regardless of the manner in which they procure trade-marked food items for resale.

Accordingly, our Association respectfully recommends that this Sub-committee do not approve the bills now before it, unless and until the safeguards so vital to the small businessmen comprising the great majority of the franchising community, are incorporated in the proposed legislation. Thank you.

Senator Gurney. I might say, in view of our problems of voting, it might save your time if you are able to summarize. The votes are coming along rapidly. Go ahead.

Mr. HOPKINS. Thank you.

Mr. Hopkins. The National Beer Wholesalers' Association of America, Inc., appreciates the opportunity to appear before the Antitrust

Subcommittee to present its views on proposed legislation concerning exclusive territorial arrangements between suppliers and their customers.

Perhaps one of the most vital aspects of the territorial issue that was not clearly brought out at the initial hearings by this subcommittee is the distinction between unilateral restrictions imposed upon a distributor by a supplier, limiting his freedom to serve a territory or customers; and bilateral territorial provisions sought by the distributor in order to provide him with the protection against unfair acts of other parties, or by the supplier itself.

The National Beer Wholesalers' Association stands vehemently opposed to any legislation which would permit a supplier to arbitrarily chop down a wholesalers' territory or rob him of his most lucrative customers, a practice which has been aptly described as "terminating

without really terminating."

Likewise, we consider a contractual provision restricting a wholesaler's territory, while reserving the right to appoint another distributor to sell in the same area, or permitting the supplier, itself, to com-

pete against its own distributor, to be unconscionable.

We believe that the Supreme Court had such restrictions in mind when it handed down the *Schwinn* decision in 1967. We find it difficult to accept the proposition that the Supreme Court or Federal Trade Commission intended to strike down territorial arrangements which tend to strengthen the franchisee's ability to perform as an independent business enterprise, while simultaneously enabling him to resist coercive pressures by giant corporations who would otherwise be free to manipulate him at will.

Should Congress permit business to enter into arrangements which mutually limit the markets in which they may operate in order to protect small businessmen from being driven out of business, then this objective can only be assured of success if Congress also limits the ability of suppliers to refuse to deal with a dealer or distributor in a manner which effectively destroys that small businessman's investment and the

value of his business.

Although their director of police and planning disagrees, the official Federal Trade Commission position is that breaking up exclusive territories would benefit smaller bottlers, wholesalers, and retailers.

among others.

If exclusive territories are responsible for concentration in the brewing industry and are contrary to the interests of the small businessman, why did 95 percent of the beer wholesalers responding to a survey by the Cambridge Center for Social Studies state that they favored brewers designating only one wholesaler for a specific territory?

 $\Lambda$  few quotes from NBW $\Lambda$  members asked to predict the consequences of prohibiting exclusive territories, summarizes the views of

independent distributors on the subject.

Now, I quote from a comment received from one of our members, a wholesaler.

He believes that:

Business conditions would favor those companies with greater financial resources; the big would get bigger by selling the larger retail accounts and eventually the less financially secure wholesalers would be eaten alive.

For a short period of time after the elimination of exclusiveness, prices would drop due to competition. However, as the less financially secure wholesalers were bought out by more powerful money men, prices would be raised, consistent with such industries as are generally monopolized.

In the end, more concentrated control of brands of beer by wholesalers is not in the best interest of the consumer. Control of the market leads to price

abuse, and the consumer suffers.

That is the end of the quotation.

Clearly, while certain types of territorial restraints deserve to be eliminated, as we have observed, neither the courts, Congress, nor the enforcement agencies are doing the small businessmen a favor by outlawing equitable, exclusive arrangements, which possess a sound economic basis and foster a healthy competitive structure.

Another underlying assumption set forth by those challenging ex-

clusive territories is that they tend to eliminate competition.

Let us not overlook the fact that granting an exclusive territory for the marketing of even a major brand of beer does not immunize the wholesaler from several forms of competition which compel him to maintain a reasonable price structure.

A Budweiser distributor who raises his price significantly above that charged by Budweiser wholesalers in adjoining markets will lose sales because consumers buying on boarded areas will switch their purchases

to retailers across the border in order to save money.

A Budweiser distributor who raises his prices above normal will also face the prospect of losing some of his customers to the Schlitz distributor or another competitor who is providing a better value from the consumer's standpoint.

Lastly, today's beer wholesaler is well aware that the higher the price of beer in his market, the greater will be the likelihood that consumers will favor substitute beverages such as wines, which are

advancing at a far greater growth rate than beer.

I might add the comment that it is my understanding that the average person consumes approximately 2 gallons of fluid per day and that the marketing game concerns not how much people will drink, but what they will drink. Therefore, as the price of any beverage goes up, the inclination will be for the consumer to switch to another type of liquid refreshment.

In conclusion, we feel that exclusive territorial arrangements which contain safeguards designed to maintain the independence of the franchisee and provide him with a reasonable prospect for survival,

are in the public interest.

The issue raised with respect to exclusive territorial arrangements is not dissimilar to that associated with predatory pricing perpetuated by large companies which may result in lower prices and more competition in the short run, while ultimately raising prices and deterring

competition.

This issue of weighing short-term price benefits to consumers against longer term endangering of competition has been illustrated in the brewing industry in recent months in the form of antitrust lawsuits against several brewers filed by competitors or customers on the grounds that they are charging unreasonably low prices in some areas compared to others allegedly to the detriment of local and regional breweries.

We recommend that the merit of the exclusive territorial concept be evaluated in terms of effects on brewers, bottlers, wholesalers, retailers, and consumers as a whole, rather than on the negligible financial detriment it may have on a few of the corporate chains which undoubtedly will survive and prosper, regardless of the manner in which they procure trademarked food items for resale.

Thank you very much.

Senator Gurney. Thank you, Mr. Hopkins.

Does the staff have any questions?

Mr. Bangert. No; in view of the time element, with the chairman's schedule, with your permission, any questions we might have we can propound in writing to Mr. Hopkins, and he, in turn, can answer in writing. I believe that is agreeable with Mr. Chumbris, also.

Mr. Chumbris. Yes, Mr. Chairman, Senator Hruska wanted me to bring to Mr. Hopkins' attention that, in interrogating witnesses on Tuesday, he used Mr. Hopkins' quote on page 3 in which he stated

that:

If large chains are ever allowed to have central warehousing and direct purchasing, it will practically eliminate the small retailers in all of our market areas. Where we now have 20,000 licensed retailers from Illinois, I can see this number drop drastically, meaning a loss of revenue and thousands of people put out of work.

Senator Hruska used that as a quote when one of the chain store operators from Michigan appeared, and he was espousing the warehousing approach. The Senator wanted to let Mr. Hopkins know he took the statement in context.

Mr. Hopkins. I can assure you the member who gave us that opinion will be pleased to know his remarks were mentioned.

Mr. Chumbris. Thank you very much.

Senator Gurney. Thank you, Mr. Hopkins. I appreciate your patience in reaching you so late in the day.

Mr. Hopkins. Thank you for the opportunity to be here. We will

be pleased to try to answer any questions through the mail.

Senator Gurney. The subcommittee will recess at the call of the chair.

(Whereupon, the subcommittee recessed at 3:35 p.m., to reconvene at the call of the Chair.)

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